

March 15, 2022

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SHERROD, TEED, VANDERHAGEN and WARE,

Plaintiffs,

-v-

Case No. 17-10164

VNA and LAN,

Defendants.

/

MOTION HEARING

BEFORE THE HONORABLE JUDITH E. LEVY
UNITED STATES DISTRICT JUDGE

MARCH 15, 2022

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P R O C E E D I N G S

THE CLERK: Calling Sherrod, Teed, Vanderhagen and Ware vs. VNA and LAN.

THE COURT: Thank you, Counsel. I believe my court reporter has already taken down your appearances. So please be seated. And give me just a minute to finish logging in. Thank you for your patience.

Well, let's see. I know Mr. Mateo. I know Mr. Rusek. I think I know -- and I know Mr. Rataj.

MR. LENNON: Hi, Your Honor. Brian Lennon from Norcross.

THE COURT: Okay. All right. I don't think I know you yet. So welcome.

And you're all where you want to be?

Of course, I know bellwether counsel. Hello. Welcome back. Just a second. All right. Okay.

Well, thank you, all, for being here. This is the date and time that was set for a hearing on various motions. I think I'm looking at the right side of the room -- that were filed by Governor Snyder, Mr. Baird, Mr. Ambrose, Mr. Earley, and Mr. Croft.

Each of those individuals have been issued trial subpoenas for their testimony in our first bellwether Flint water trial, which began on February 15, 2022. And at the current time, promises to continue for several more months.

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1 So today the jury is obviously not here. But for
2 those who are following on Zoom, they can't see the jury box.
3 So if for any reason you want to be seen during your argument,
4 Mr. Rataj or Mr. Lennon, you may need to move.

5 Actually you will need to move, because you won't
6 have a microphone. But we'll address that in a minute. So
7 just be seated and we'll sort that out. Okay.

8 So we -- one of our jurors had an appointment that
9 conflicted with service today, so we adjourned the trial
10 yesterday and today for that reason.

11 So as I understand the facts of sort of where we are
12 and what we're doing in the hearing today, all of the
13 individuals I just listed have informed the Court by way of
14 their motions that they wish to avail themselves of the Fifth
15 Amendment's protection against self-incrimination, and they
16 want to avoid any appearance at all at our trial.

17 Before hearing your further arguments, I want to set
18 forth a few facts as I understand them and ask that when you
19 make your argument, you correct any assumptions I have made
20 that you believe are incorrect.

21 So I'll begin with where I think we are and what got
22 us here. And then be sure to tell me where I'm wrong.

23 So this litigation was filed originally in 2016.
24 Though, the bellwether docket for our case has a 2017 number.
25 So let's assume that it was filed that year.

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1 When the case was filed, aside from Mr. Baird, all of
2 the witnesses who are represented here today were named
3 defendants in that case.

4 Governor Snyder and the other defendants filed
5 various motions to dismiss the entire litigation. And
6 although some of the claims were dismissed at various times,
7 plaintiffs' claims for violation of the right to bodily
8 integrity survived those motions before me and on appeal. So
9 they all continued as parties in this litigation.

10 VNA and LAN were also defendants in 2016 and 2017,
11 and, of course, they are today, as well. And they filed
12 notices of nonparty at fault naming each of these individuals
13 including Mr. Baird as early as November 13, 2018, in Carthan
14 case, which is 16-10444 and December 10, 2019, on this docket.

15 At a number of points throughout the litigation, the
16 issue of the Fifth Amendment right against self-incrimination
17 was raised by a number of defendants. It was raised very
18 early on prior to my decision on the motions to dismiss when
19 document discovery was underway.

20 And it was raised again in a motion filed by the
21 individual Flint defendants who are here today, Mr. Ambrose,
22 Mr. Earley, and Mr. Croft on September 27 of 2019.

23 That second pass at the issue involved a motion to
24 stay the depositions that are in large part at issue today of
25 Mr. Ambrose, Mr. Earley, and Mr. Croft who at that time were

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1 still defendants in the litigation.

2 Governor Snyder and Mr. Baird did not request a
3 protective order related to their depositions or at least not
4 that I recall. So certainly correct me if I'm wrong there.

5 Mr. Baird did not file any sort of motion for a
6 protective order regarding his deposition. That much I know
7 for sure.

8 I issued a written decision on that motion that had
9 been filed in September of 2019. That was issued on
10 November 7 of 2019. And it granted in part and denied in part
11 the individual Flint defendants' or individual city
12 defendants' motion.

13 And in that motion, I granted -- the motion was for a
14 stay of discovery. It was saying, "We should not have to or
15 be forced to sit for our depositions in this litigation,
16 because we have full knowledge that we face a risk of
17 prosecution."

18 Certainly a possibility. Maybe a probability of
19 prosecution for the same facts.

20 And so they wished to have me stay the litigation so
21 that they would not be faced with the question of whether to
22 have an adverse inference, whether to risk an adverse
23 inference of if they took the Fifth Amendment right to remain
24 silent or waive their rights, thus getting us to where we are
25 today.

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1 So in my opinion, I specifically focused on the fact
2 that these witnesses could potentially face a choice between
3 invoking or waiving their Fifth Amendment rights. And so it
4 was set forth in writing, available obviously to the
5 individual city defendants but also to Governor Snyder and
6 Mr. Baird.

7 I noted that the issue of waiver -- I noted that in
8 the opinion. It specifically set forth, quote, "In general,
9 the ICDs have set forth a plausible fear of prosecution."
10 Everyone was on notice of that. But most certainly they were,
11 because they brought the motion.

12 But even though there is an overlap between civil and
13 criminal allegations, they cannot assert the Fifth Amendment
14 right in advance of being asked a question.

15 So no one was compelled to answer a single question.
16 As a result, they simply had to assert it on a
17 question-by-question basis.

18 I noted the United States v. U.S. currency decision
19 that counsels against requiring individuals to choose between
20 exercising their Fifth Amendment privilege and the substantial
21 sums of money that were the subject of that case.

22 I then went on to limit attendance at the deposition
23 to only attorneys on the case, and there were no shortage of
24 those. But that's neither here nor there.

25 But I say all of this just as part of the facts that

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1 I understand leading to our hearing today that before any of
2 the witnesses who have brought these motions today ever
3 testified in the summer of 2020, they had my proviso that they
4 faced a plausible fear of prosecution and could most certainly
5 assert their Fifth Amendment rights in the subsequent
6 depositions.

7 Again, another thing I'd like to note in terms of the
8 chronology here is that at the time of at least the first day
9 of everyone's deposition, all but Mr. Baird were still
10 defendants in the case. They all were represented by counsel
11 and all proceeded to testify and not remain silent as to any
12 questions.

13 The individual city defendants drew my attention to
14 the Judge Lawson case regarding Davontae Sanford. And that
15 was a single deposition where at a certain point, he received
16 his lawyer's advice not to continue answering questions.

17 It doesn't relate to our issue at all, which is
18 whether there's a single proceeding and a waiver that would
19 apply.

20 But the background during this time, the Solicitor
21 General of Michigan had announced that although certain
22 criminal charges were dismissed, an investigation would be
23 ongoing and could lead to charges against the same individuals
24 plus others who had not ever been criminally charged such as
25 Mr. Baird and Governor Snyder.

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1 Now, she did not list them by name, but there was
2 certainly a warning sign there regarding who would be in
3 charge of producing documents.

4 So with all of this knowledge, all five witnesses sat
5 for their depositions between May and July, and I think there
6 was a second day of depositions in September. They were all
7 represented by counsel. And I note that Governor Snyder
8 himself is a lawyer. And I only note that because the -- in
9 RE Mayor Morganroth case noted that Mayor Morganroth is a
10 lawyer.

11 So the next thing I have sort of factually is that
12 plaintiffs and the public officials in this case reached a
13 settlement. And Governor Snyder, Mr. Croft, Mr. Ambrose, and
14 Mr. Earley became nonparties to the litigation effective at
15 least with the preliminary approval of in November 2021, which
16 was after their depositions.

17 So let me say one thing more. So those are sort of
18 the general facts as I see them. So please tell me where I've
19 misunderstood them.

20 But I want to mention an area of argument I think
21 primarily to Mr. Lennon that will not be helpful to me. Just
22 so that you can consider -- you can still provide it, if you
23 wish to make a record on the issue.

24 But you mention in your reply brief that this wish to
25 potentially go beyond the deposition testimony by VNA and LAN

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1 is what you called "gamesmanship" because they are seeking to
2 shift the blame away from themselves and onto your client and
3 others who are here today. And I can tell you most certainly
4 they are.

5 And gamesmanship aside, absolutely they are. And as
6 you know, Michigan is a fair share liability state, and they
7 have the absolute right to do that if the facts support that
8 conclusion.

9 There's nothing untoward about doing what they're
10 doing in this instance which is zealously representing their
11 clients in accordance with Michigan law. That's just simply
12 how it works. So but you can certainly emphasize that if you
13 wish to.

14 So here we are at the present with each of these
15 clients having received a trial subpoena from either one or
16 more parties. And indicating the broad nature of the -- I
17 think that's the fact I left out, which is that your clients
18 were indeed criminally charged in some remarkably broad
19 charges.

20 So I am absolutely aware of that. And they now wish
21 to assert a blanket Fifth Amendment right against
22 self-incrimination.

23 So I've had an opportunity to read your briefs, to
24 read the earlier sort of letter briefs that the parties in the
25 case filed and submitted before your motions to quash. So

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1 I've read all of that. Thank you very much for the
2 submissions.

3 The way I see the legal question -- but you can make
4 any legal argument you want -- is my focus at this point is
5 whether the depositions given in the summer of 2020 before the
6 criminal charges were filed against Governor Snyder and
7 Mr. Baird and before the criminal charges were filed again for
8 Mr. Ambrose, Earley, and Croft, whether these are the same
9 proceeding.

10 It would be helpful to me if your argument does not
11 rely -- although make the record you want to make -- but it
12 would be helpful to me if you don't rely on cases where an
13 individual testifies at a grand jury and then later wants to
14 invoke their Fifth Amendment trial -- or right at trial. I
15 clearly see those as two different proceedings.

16 At the time of the grand jury testimony, there is no
17 case other than the prosecutor trying to see whether the grand
18 jury will indict the ham sandwich or whatever they're going to
19 indict.

20 And so the risks, the analysis, all of the things
21 teach me and tell me that those are two different proceedings.
22 A grand jury when there's not yet an indictment and later
23 testimony at trial.

24 So I see those at different proceedings, and what I'd
25 like to focus on is whether deposition in a civil case where

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1 notices of nonparty at fault cover everybody, including
2 Mr. Baird.

3 Defendants are -- the witness were otherwise
4 defendants in our case. They are represented by counsel,
5 which is not true at the grand jury or inside the grand jury
6 room.

7 And so please, if you will, focus on that.

8 So what I'd like to do I think is start with --
9 unless you all have worked out an order, I would start with
10 Mr. Lennon.

11 But I see Mr. Rusek is sitting right there with the
12 microphone.

13 Do you want to start?

14 MR. RUSEK: Your Honor. Good afternoon.

15 THE COURT: Good afternoon.

16 MR. RUSEK: Can you hear me okay through the mask and
17 the microphone?

18 THE COURT: Yeah. I'll put my mask back on. We just
19 got -- I should tell everyone for particularly bellwether
20 counsel, our court reconstitution committee just yesterday
21 afternoon issued their updated guidance. And, sir, you'll
22 need to put your mask on above your nose, sir.

23 And that they issued guidance that no longer do we
24 have to take the temperature coming in. But masks are still
25 required in all of our buildings. So I apologize for taking

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1 mine down. But I'm 20, 30 feet from all of you.

2 So go ahead, Mr. Rusek.

3 MR. RUSEK: I have no objection if you want to remove
4 your mask. That's fine by me. Not that I have a say in it.

5 THE COURT: Thank you. No, I know. But I appreciate
6 knowing that.

7 MR. RUSEK: And I'm just happy to be back here, Your
8 Honor.

9 THE COURT: Oh, I'm very happy to see you.

10 MR. RUSEK: It has been so long, and I actually have
11 the opportunity to bring my law clerk Alex Tolzman with me
12 today, her first time in federal court.

13 THE COURT: Welcome.

14 MR. RUSEK: She's been on Zoom a lot but
15 unfortunately has never sat foot in a federal courthouse
16 before. And I was looking back on it. The last time I was
17 here was almost exactly two years ago for a status conference
18 right before we shut down.

19 THE COURT: Yeah. It was like March 12, or yeah.

20 MR. RUSEK: The 11th.

21 THE COURT: I think it was the 11th. Exactly.

22 MR. RUSEK: And as you noted earlier, Your Honor,
23 it's been about 860 days since we really last addressed the
24 Fifth Amendment issues in this case. And a lot's changed.

25 I think that part of my argument today is going to be

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1 providing a little bit of a supplement to the timeline that
2 you already gave.

3 As far as Mr. Croft is concerned, I think that you
4 hit many of the high points. So I will avoid those and just
5 kind of fill in where I think it's appropriate in regards to
6 our motion today.

7 I then expect Mr. Mateo on behalf of Mr. Earley. And
8 then Mr. Swor is going to be arguing on behalf of Mr. Ambrose.
9 Mr. Quigg will be arguing on behalf of Governor Snyder. And
10 then Mr. Levine will be arguing on behalf of Mr. Baird.

11 THE COURT: Okay. Mr. Levine for Baird. Quigg for
12 Snyder. Okay. Go ahead.

13 MR. RUSEK: And I think that we're going to do a hot
14 seat thing and switch if that's okay with the Court, Your
15 Honor.

16 THE COURT: That's okay. And just remember to remain
17 seated so you can be heard in the microphone.

18 MR. RUSEK: To get back to the timeline, Your Honor,
19 you did hit on a lot of the primary points in regards to this
20 litigation.

21 I think it's important to know when you're analyzing
22 both the ability to assert the Fifth Amendment by the ICDs as
23 well as when you're considering whether or not there's been a
24 waiver is that we have to take a look at all these changed
25 circumstances.

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1 In the outside world, of course, we've had a
2 pandemic. We've had a new president elected. We're maybe on
3 the verge of war with Russia over Ukraine.

4 And then, of course, on a personal level, the
5 individual city defendants have seen vast amount of change
6 since we were last here on the Fifth Amendment issues. To
7 give a little bit more context as to the criminal charges,
8 back in June of 2013 -- or excuse me -- June 13 of 2019,
9 Solicitor General Fadwa Hammoud had taken over the criminal
10 investigations --

11 THE COURT: You know, and it may work best if the
12 individual speaking only take off their mask if you want to.
13 And if anybody else wants to move further away, feel free.

14 Okay. But slow down, Mr. Rusek.

15 MR. RUSEK: Thank you, Your Honor. It's always
16 difficult trying to yell with the mask on there.

17 So back in June of 2019, we have the solicitor
18 general who has taken over the criminal investigation. The
19 former office of special counsel had been fired at that point
20 in time. And all of the pending charges against multiple
21 people in relation to the Flint Water Crisis were dismissed.
22 And dismissed without prejudice.

23 And at that point in time, we were just beginning to
24 really get into discovery in these cases. And we were
25 focusing on how can we do depositions in a timely, efficient

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1 manner. And that brought us before the Court in September
2 through November of 2019 on our motions to stay.

3 Following those, there were multiple days of
4 depositions that occurred in 2020 --

5 THE COURT: What doesn't this argument that you're
6 providing to me now -- it would be matter if we're looking at
7 these as two different proceedings.

8 So there were one set of risks at the time that they
9 testified in the summer of 2020 and a different set of risks
10 that should be analyzed now.

11 What I'm looking at -- what I'm interested in is your
12 argument for why this is not a single proceeding where they
13 waived their rights with respect to only those questions that
14 were asked at the deposition.

15 And then if I were to find the Fifth Amendment rights
16 were waived under that single proceeding rule, then we would
17 look at whether there is any possibility that additional
18 questions would expose your clients to further risk.

19 And I'll tell you, I'd be very generous in looking --
20 I'm instructed by the Sixth Circuit and the Supreme Court to
21 be very generous in that assessment of whether further
22 questioning could tend to incriminate your client.

23 MR. RUSEK: Absolutely, Your Honor.

24 THE COURT: Okay.

25 MR. RUSEK: To round out a little bit of that

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1 timeline --

2 THE COURT: Okay.

3 MR. RUSEK: -- before getting into the waiver issue,
4 because I think it is important, is almost right after your
5 decision, the November 2019 opinion --

6 THE COURT: Yes.

7 MR. RUSEK: -- there was a one-man grand juror
8 substituted in Genesee County. It was a secret proceeding.
9 And that began very beginning of January of 2020. And it went
10 all the way through January of 2021, eventually culminating in
11 the unsealing of the indictments against nine men and women.

12 So while that grand jury proceeding was ongoing, we
13 actually were sitting for depositions. As you noted earlier,
14 Mr. Croft, he sat for two days of depositions. Those were in
15 May of 2020. He then sat for a third day, and that was in
16 September of 2020.

17 Mr. Ambrose sat for depositions in June of 2020 and
18 then Mr. Earley sat for depositions in July of 2020.

19 So in some ways, these cases are kind of analogous to
20 those waiver cases that discuss testimony before grand jury.
21 Because -- and I can't say --

22 THE COURT: Let me ask you a little bit about that.

23 Why -- when somebody's testifying before a grand
24 jury, they don't have the benefit of counsel present with them
25 for their testimony. There isn't a case yet. So I see that

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1 as two very different proceedings.

2 So I don't see them as the same proceeding at all.
3 The motivations for testifying before a grand jury as a
4 third-party witness, not the target of the grand jury, are
5 very different from what might potentially -- the witness
6 might be exposed to at trial.

7 Why is this case not like the Moser v. Heffington
8 Maryland Supreme Court case that held that a deposition and
9 trial in one civil case are the same proceeding?

10 MR. RUSEK: Yes, Your Honor. I think that there's a
11 smattering of cases that go both ways on that kind of exact
12 issue. And we have some from the Sixth Circuit. That would
13 be like the Lavdas case, the Sanford case --

14 THE COURT: We don't have -- the Sanford case, that
15 was the Lawson case that I mentioned earlier where Davontae
16 Sanford started to answer questions at one single deposition
17 and then said, "Oh, boy, not those questions. Those could
18 incriminate me."

19 So I don't -- that's just one proceeding, literally,
20 one deposition in one case.

21 So that's not applicable from my perspective.

22 The other cases that you cited -- and thank you for
23 attaching them. Just made it easier. So there's the Davontae
24 Sanford case. And then you cited --

25 MR. RUSEK: The Lavdas jewelry case.

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1 THE COURT: Yeah, the Lav -- L-a-v, as in Victor,
2 d-a-s Jewelry Limited case.

3 That's in Eastern District of Michigan. It is
4 Judge Pepe, whose chambers were right next to us almost all of
5 his time on the bench.

6 And that was whether a police interview is the same
7 as a deposition. And from my perspective, a police interview
8 is generally not done under oath, sometimes not done with a
9 lawyer present, and there's certainly not yet a case.

10 So that to me doesn't fit our circumstance at all.
11 We're not in the ballpark there with this case. Because our
12 circumstance is a case; known defendants, known nonparty at
13 fault notice for Mr. Baird.

14 And it's absolutely known that there's the
15 possibility of criminal charges if not also the probability.
16 But I think in RE Convertino teaches us that it's not just the
17 probability, the mere possibility of charges that puts people
18 on notice of whether they're going to wish to waive their
19 rights.

20 So the Lavdas case didn't help me.

21 Then we have the Satko -- or Satka, S-a-t-k-a. And
22 this was again where an individual testified before being
23 added as a defendant was not represented by counsel. And then
24 it was held that further testimony would be protected by the
25 Fifth Amendment.

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1 And here I'm going to look at further testimony very
2 carefully for your client and all of the other clients. We're
3 talking about the known testimony at the deposition in this
4 case.

5 Go ahead. I'm sorry.

6 MR. RUSEK: Thank you, Your Honor. I'll try to
7 address all of the points. And I think that it this may be
8 helpful to talk about the policy behind the single proceeding
9 rule and what that's meant to prevent.

10 A lot of these cases, I'll say I don't think that
11 there's a Sixth Circuit or a case that I found anywhere in the
12 country that has facts like these. It's a pretty exceptional
13 case. And if exceptional relief is ever warranted, this would
14 be the kind of case that I think it comes in.

15 From what I can gather from reading a lot of these
16 single proceeding rule cases, though, is that what we want to
17 avoid is someone using the Fifth Amendment as a shield and a
18 sword in a way that they protect themselves while advancing
19 their interest.

20 And I think in the Sanford case, we see where it's a
21 nonparty witness and Judge Lawson makes that distinction where
22 a nonparty witness has more latitude in asserting the Fifth.
23 So I think that the case is applicable in that sense, even
24 though factually it's quite different from here.

25 But we have five gentlemen who sat for depositions

1 above and beyond what normally would be required -- Mr. Croft
2 for three full days -- and at no point in time did they assert
3 their Fifth Amendment rights. A lot of these cases, and why
4 we have the single proceeding rule, is to avoid someone
5 saying --

6 THE COURT: Well, we don't really have the single
7 proceeding rule. We're trying to figure out if we have the
8 single proceeding -- the Sixth Circuit has not issued clear
9 guidance on that.

10 So we're trying to figure out what is the appropriate
11 path forward in light of all of the Sixth Circuit's rulings
12 and the Supreme Court, and then we can certainly look to other
13 courts for some guidance.

14 MR. RUSEK: And you're absolutely correct, Your
15 Honor. We don't have the majority rule being adopted in the
16 Sixth Circuit explicitly. But in some of the cases that we
17 cited in our briefs, it has been widely adopted.

18 And what that single proceeding rule seeks to prevent
19 is having a deponent use the Fifth Amendment to avoid
20 answering the tough questions that will put them in a worse
21 spot in the litigation while they can answer questions that
22 favor them.

23 So if you're trying to assert the Fifth in a way that
24 protects you, we don't condone that as single proceeding at a
25 single deposition. If you're going to sit for that deposition

1 and testify, then you need to answer questions about the
2 details that come out.

3 In the Sanford case, that's only one deposition, and
4 that --

5 THE COURT: Tell me where that -- what case should I
6 look at for that as the explanation?

7 As opposed to -- I mean, some rendition of what
8 you're saying, but primarily that an individual who decides to
9 waive their Fifth Amendment right at a deposition in a civil
10 case with the advice of counsel, with counsel in the room,
11 knows the risks then and knows them at trial and can't avoid
12 the inconvenience, hassle, and so on, of appearing at trial.

13 MR. RUSEK: Yes, Your Honor. And I think that -- I
14 think that applies particularly when you have a party witness
15 who is going to try to assert the Fifth at trial.

16 That goes into the gamesmanship sense of this. And
17 Mitchell v. United States, 526 U.S. 314 discusses some of
18 those concepts.

19 THE COURT: Slow down.

20 MR. RUSEK: Absolutely.

21 So Mitchell discusses some of those concepts, and I
22 think that they carry through, I believe, the Sanford court
23 also talked about gamesmanship. And if I remember correctly,
24 in RE Morganroth also had some discussion there.

25 But where that brings us, Your Honor, is that these

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1 gentlemen did not engage in anything like that. You know,
2 they appeared for two or three days of depositions --

3 THE COURT: Yeah.

4 MR. RUSEK: -- fully answered. With the knowledge
5 that, of course, were charges plausible? Yes.

6 We also had lost the November 2019 ruling on the EMA
7 nationwide factors, because there were no pending criminal
8 charges at that time.

9 We had many considerations and high stake litigation
10 that we had to take into account. And we didn't know about
11 these secret grand jury proceedings that sought to charge all
12 these gentlemen, and we wouldn't until they were revealed in
13 January of 2021, shortly before they were arraigned in Genesee
14 County.

15 One of the cases that we haven't talked about yet is
16 the Satka case --

17 THE COURT: I think I just talked about it.

18 But go ahead if you want to --

19 MR. RUSEK: Yes, Your Honor.

20 This, I think, has some facts that are pretty close
21 to where we're at. Nothing that's right on point. I don't
22 expect there likely ever be a case right on point with these
23 facts.

24 But in Satka, there is a Mr. Pappadakis who was --

25 THE COURT: P-a-p-p-a-d-a-k-i-s.

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1 MR. RUSEK: Correct.

2 And he was deposed by a third party subpoena. And
3 from the opinion, it also seems like he responded to --

4 THE COURT: I think I -- I think just discussed this
5 case a moment ago. Because the difference there is that he
6 testified before he was added as a defendant in the case. He
7 wasn't represented by counsel.

8 And I read the case as relating to further testimony.
9 And we can protect further testimony in our case.

10 It says, in fact, the court in the Satka case says,
11 "Rather in all likelihood, the government seeks additional" --
12 and it's in italics -- "additional information from
13 Pappadakis. In fact, the government acknowledges that absent
14 additional testimony, it will have a," quote, "substantially
15 more difficult time proving its case."

16 So I think that case isn't like our case. That --
17 the holding here relates to additional testimony, and it's
18 clearly two different proceedings when the individual
19 testifies.

20 MR. RUSEK: Yes, Your Honor. My memory on that case
21 in my notes is that the government had sought a continuous
22 deposition of Mr. Pappadakis.

23 But I think that it's similar to where we
24 procedurally are because certainly Mr. Pappadakis would know
25 that -- the context of the proceedings. I believe that he was

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1 a loan officer or related in some way to the loan process,
2 that the defendants in that case were being accused of
3 committing fraudulently.

4 And he gave his deposition. And then he receives his
5 target letter from the U.S. Attorney's Office.

6 THE COURT: Right.

7 MR. RUSEK: Which is similar to where we stand. But
8 our clients were indicted after the depositions.

9 THE COURT: They had been indicted before the
10 depositions, temporarily were not indicted, but with a promise
11 that a scorched earth review of every document ever known
12 would be undertaken and that they could be reindicted and
13 others could be indicted, as well.

14 MR. RUSEK: That's true, Your Honor.

15 THE COURT: I think that's very different from the
16 Satka case where also he wasn't represented by counsel the
17 first time. Your clients were.

18 MR. RUSEK: We also had an additional consideration,
19 Your Honor, and that was your November 2019 order. At that
20 point in time, I think you were correct. All we had was press
21 releases to go on saying these charges were dismissed with
22 prejudice. They have the ability to re-- excuse me.

23 They were dismissed without prejudice. That the
24 government had the ability to re-file. That they had said
25 publicly they're investigating.

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1 But we didn't have really concrete evidence that they
2 would be charged again. And that's large part, I believe,
3 why --

4 THE COURT: But why doesn't the Convertino case stand
5 for the risk that you need to assess at the time of waiving is
6 if there's a possibility, not a probability of indictment?

7 MR. RUSEK: Yes. I think that the same would apply
8 to all these cases if it's plausible, Your Honor. Especially
9 like the Satka case.

10 If you're being deposed in connection with a
11 fraudulent loan scheme, surely it's plausible -- possible that
12 you could be charged in the future.

13 THE COURT: Yeah. I just see the Satka case as
14 standing for a different thing. But we can continue if you
15 want with it.

16 MR. RUSEK: I'll move on, Your Honor.

17 THE COURT: Okay.

18 MR. RUSEK: But the Court also said that it didn't
19 even have to get to the majority or minority view in adopting
20 one of those in that case, as well.

21 And, of course, the court declined to rule on whether
22 or not that deposition testimony was even admissible at trial
23 against Mr. Pappadakis. Because of the Fifth Amendment
24 issues, they weren't raised at that time.

25 When --

1 THE COURT: Tell me what the additional risk is,
2 Mr. Rusek, for your client in testifying. Let's start just to
3 the very questions that he already answered at his deposition.
4 What is the risk he -- what's the new risk that he faces?

5 You're not filing a motion to quash the playing of
6 the video of that deposition. That would be in open court for
7 all to see and all to hear, including the prosecutor on the
8 new criminal charges.

9 What's the new risk?

10 MR. RUSEK: Absolutely, Your Honor.

11 And I think that you just laid out what would be my
12 preferred method of having this testimony presented to the
13 jury --

14 THE COURT: I know. Because you put it in the brief.
15 I didn't have to guess. I read your brief.

16 MR. RUSEK: But there's serious risk. I believe it
17 was the Morganroth case that really established that even a
18 verbatim answer compared to prior testimony can still be
19 further incriminating to someone.

20 In Morganroth, I believe that main concern was
21 perjury charges that could come out of it. Now, we certainly
22 have Mr. Baird who's been charged with perjury. So that's not
23 beyond the prosecutors in these cases.

24 So that's a concern.

25 But even repeating their testimony carries that risk

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1 of a further establishing the record.

2 The VNA defendants, they put out there that we could
3 ask some questions at trial that would go beyond what's
4 already been out there. Like what were their positions, their
5 experience, the understanding of the responsibilities and
6 authorities of these gentlemen? And I can talk to Mr. Croft
7 specifically. But his charges are willful neglect of duty.

8 And for a prosecutor to prove those charges, one, I
9 mean you just have to prove he's a public official. Then you
10 get into what duties are enjoined by law, what he was required
11 to do. So -- and then what he did or did not do in regards to
12 those --

13 THE COURT: Let's go back a step to in RE Morganroth.
14 There we learned that -- let's just set that aside for a
15 second, because I'm not sure I followed what you were
16 suggesting it stood for.

17 But you -- so you're okay with the video being
18 played?

19 MR. RUSEK: Correct, Your Honor.

20 THE COURT: Yeah. And you put that in your brief.
21 So what is the risk of your client answering the very same
22 questions in open court? Because some of these cases suggest
23 that it's ideal for a jury to see people and assess their
24 credibility and so on in person as opposed to some other
25 method.

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1 So what is the additional risk showing up?

2 MR. RUSEK: Yes, Your Honor. I think there's a
3 couple of parts to that.

4 THE COURT: Okay.

5 MR. RUSEK: One, if it's just a verbatim recitation
6 of the prior answers, then it is an under oath statement. And
7 like in Morganroth, that could be a basis for perjury charge.
8 I don't think that --

9 THE COURT: But Morganroth held that that alone isn't
10 enough. That every single civil deposition, the person could
11 then take the Fifth and say, "I could be charged with perjury,
12 because I need to be impeached in my deposition."

13 And obviously we don't have that rule.

14 But go ahead.

15 MR. RUSEK: Yes, Your Honor. I think the even
16 stronger, bigger concern is that we have to recognize that
17 we're not going to have verbatim answers as they were provided
18 for in the depositions. There's no way to ensure that other
19 than just to have them up there reading from the depositions
20 at the end of the day.

21 So we're going to have new, different testimony at
22 trial. And the charges against all five of these gentlemen
23 are so wide ranging that they cover essentially their entire
24 time being employed or having any relation to the City of
25 Flint in the Flint Water Crisis.

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1 I don't see a way that we can efficiently and
2 effectively have them testify without subjecting them to a
3 real probable threat of further indictments based on that
4 testimony or stronger support for the charges they're
5 currently facing for the prosecutors.

6 THE COURT: What if we did this. What if we played
7 the deposition for the existing questions, hold a hearing
8 outside the presence of the jury for the additional questions
9 that VNA and LAN and potentially plaintiffs -- but I think
10 plaintiffs don't have any additional questions.

11 Hold a hearing outside the presence of the jury to
12 determine whether there's a possibility of further
13 incrimination with those questions knowing full well that I
14 intend to protect their Fifth Amendment rights.

15 What would be wrong with that?

16 MR. RUSEK: Yes, Your Honor. I think that's not a
17 very efficient --

18 THE COURT: I don't care -- I have time. I have
19 plenty of time.

20 MR. RUSEK: But beyond that, there's risk associated
21 with any kind of questioning. Maybe I didn't hear you
22 correctly --

23 THE COURT: You -- I don't think you heard me.

24 What if we play the deposition -- so there's no
25 further risk of a different twist on an answer or an emphasis

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1 or a deemphasis or something to that effect that could put
2 your clients at further risk by answering the same questions.

3 Then before doing that, we hold a hearing outside the
4 presence of the jury where VNA and LAN sets forth the areas
5 that they want to question your client.

6 You're here to represent your client and tell me why
7 that would expose them to a possibility of self-incrimination
8 knowing at that time that I will fiercely protect their
9 constitutional rights.

10 What's -- and then if some questions are deemed by
11 myself that they will not expose them to further liability or
12 incrimination, then and only then will they take the stand to
13 answer those questions. Only those. The rest are on the
14 deposition.

15 MR. RUSEK: If my client did not have to take the
16 stand or provide additional, even off-the-record testimony, I
17 guess I don't see --

18 THE COURT: Your client would only take the stand if
19 in this little procedure that I'm outlining, I determine that
20 you have not set forth on behalf of your client a general
21 argument that answering those questions would expose them to
22 further liability.

23 MR. RUSEK: Yes, Your Honor. I don't think I would
24 have much of an opposition. I would want to confer, of
25 course. But without them providing testimony or having to

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1 give even a preview of that testimony --

2 THE COURT: No. I wouldn't ask for the testimony.
3 Because in some ways I think Judge Cleland got a little -- you
4 know, ended up asking Dave Ashenfelter to put forth his
5 testimony. But it was sealed, thank goodness.

6 But so, no, I'm not asking for the testimony, because
7 then we've got the -- that's what we don't want. We don't
8 want the testimony if it really would incriminate them. We
9 only want the testimony if it would not further incriminate
10 them if there's no possibility that it would further
11 incriminate them.

12 MR. RUSEK: Thinking about it, Your Honor, I think
13 that would be a workable solution with some pitfalls
14 potentially.

15 As to Mr. Croft specifically, he had three days of
16 depositions. When we take a look at the charges against him,
17 they are so wide ranging that there's probably not much else
18 that he could give as far as information through testimony
19 that would not tend to incriminate him in some way based on
20 the willful neglect of duty charges.

21 And when -- especially when we take a look at what
22 those charges say, verse, say, like the VNA notice of nonparty
23 at fault, there's parts of them that are almost mirror images.

24 So I'm not sure if the defendants could actually put
25 on some kind of foundation for what else we need.

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1 THE COURT: I don't know. I've got no clue. I
2 haven't -- I'm busy reading other people's depositions, ruling
3 on objections. I haven't -- I don't even think I have his
4 deposition. So I haven't read it. I haven't watched it.

5 MR. RUSEK: It's about a thousand pages, Your Honor.
6 It's a long one.

7 THE COURT: Many others are, as well. I assure you
8 of that. So why don't we continue with the argument, and you
9 continue to think about that as an approach.

10 Because certainly if we -- if you're making the
11 argument that if the very same questions are asked of him as
12 were asked at the -- let's say it's a single proceeding. He
13 waived his rights against self-incrimination by testifying for
14 three days. So those questions are fair game here.

15 But you're saying they could potentially expose him
16 to further liability in the way he answers them in his
17 demeanor, in something. Maybe he'd say "no" when he meant
18 "yes." Something.

19 And so the only thing that would be left is further
20 questions, areas that go outside the deposition. If we have a
21 hearing on those areas that go outside the deposition, you
22 disagree with my ruling, you can appeal it. You'll have --
23 you would have time to do an interlocutory appeal to sort that
24 out.

25 MR. RUSEK: I think that could be workable, Your

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1 Honor. And just to clarify, especially for the record, is
2 that in some of the briefing that we received in response to
3 our motion, it seems to have some conflation between asserting
4 the Fifth for the purposes of deposition and later introducing
5 that deposition testimony at trial.

6 THE COURT: Wait. What was that?

7 MR. RUSEK: There seems to be some confusion. So the
8 VNA defendants, they cite to United States vs. Vecchiarello --
9 I'm going to butcher it. It's V-e-c-c-h-i-a-r-e-l-l-o.

10 And also United States vs. White. And those are
11 cases that the deponent tries to say, "I didn't waive my Fifth
12 Amendment rights at the deposition. I'm asserting them now.
13 You can't bring that deposition testimony to the trial."

14 We're not making that argument. The and, of course,
15 I'm not going to opine on any evidentiary ruling. But 804
16 would allow the Court to have the video recorded depositions
17 played because the five gentlemen would be unavailable
18 witnesses.

19 That would also allow, if the defendants wanted to
20 say "introduced," legislative testimony. Those five gentlemen
21 would also be unavailable for trial, and then they could bring
22 in that testimony.

23 We're not trying to say, "Keep the video out.
24 Deprive the jury of that information." We -- at least on me,
25 we admit we waived for the purpose of the deposition, because

1 we didn't assert it. So that testimony, we're not here today
2 to say, "Keep that from the jury."

3 Rather it's that continued testimony in what you
4 identified as that further threat is our real concern here.

5 THE COURT: Yeah.

6 MR. RUSEK: I think that you really identified that,
7 Your Honor.

8 THE COURT: I think I identified -- I don't know that
9 there's legal support for what I identified, because I think
10 if you waive the Fifth Amendment at the first part of this
11 proceeding -- which I am giving you a little foreshadowing of
12 where I'm coming from -- I think there's every reason to
13 believe that those depositions are part of the same proceeding
14 that the trial is a part of.

15 But setting that aside, I'm not -- I think if you've
16 waived it, you've waived your rights for all purposes
17 regarding those questions. And even if you answer the
18 questions slightly differently, I think that's what the law
19 says.

20 But I'm still seeing maybe there's just a way forward
21 for us that is a compromise way forward.

22 MR. RUSEK: And I think there is, Your Honor. And I
23 think that what you've presented here is one of those ways
24 that we could potentially get there while protecting the
25 constitutional rights of these five gentlemen while also

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1 allowing the jury to hear the evidence in this case.

2 And not having them paraded in front of the jury to
3 say, "I assert the Fifth," over and over and over again.

4 THE COURT: No. We're not -- we won't need it over
5 and over and over. We'll sort out what would possibly lead to
6 further incrimination. Those questions -- those areas won't
7 be asked in front of the jury.

8 But certainly, there may be one or two areas where
9 they assert the Fifth. I don't know about that but.

10 MR. RUSEK: And, Your Honor, I do think there is
11 support from Davis B. Straub, U.S. v. Bates and U.S. v.
12 McCallister if the Court did want to go and look at a solution
13 where there's more of a blanket assertion of the Fifth
14 Amendment right.

15 And I'll reserve getting to the nitty-gritty on how
16 the criminal charges really overlap on the defendants'
17 evidence in this case. But there's almost a complete overlap.

18 THE COURT: I'm sure. I don't doubt that. So I
19 don't think that will be necessary to argue.

20 So, now, Mr. Rusek, do you have further argument, or
21 do you want to yield the floor or whatever they say?

22 MR. RUSEK: I'm about ready to yield, Your Honor.
23 But just in some summary and closing remarks here.

24 THE COURT: Okay.

25 MR. RUSEK: There has been a massive change in

1 circumstances for everyone in this case. And the risks are
2 certainly much higher now for all of the gentlemen that are
3 charged and, especially the gentlemen who are facing serious
4 felony charges and the potential for prison time if convicted.

5 They have chosen to assert their rights now that
6 there is a pending criminal indictment against all of them.

7 As attorneys for those charged with crimes, I think
8 that we also have a duty under the Sixth Amendment to advocate
9 as much as we possibly can to ensure that they have the
10 effective assistance of counsel for their upcoming trials and
11 in these ancillary proceedings.

12 I don't believe that they have waived their rights
13 outside of the depositions. And while we don't have a case
14 that's directly on point, I think that overall, the majority
15 view supports that the deposition is not a single proceeding
16 in regards to trial in these cases.

17 And really in conclusion, Your Honor, I'd ask the
18 Court to also take into account the potential impact that the
19 Court's decision can have on the pending criminal cases and
20 their eventual trials themselves.

21 And in that regards, there's a lot of media
22 attention. One for this trial , this hearing being broadcast.
23 I think I saw over 6,000 people at one point on the webinar
24 stream.

25 THE COURT: I don't think so. We have it running.

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1 It's usually between -- I think we've gotten 200 or something
2 for opening. But -- 200-something. But under 300 for
3 opening.

4 MR. RUSEK: I may have been looking at a different
5 counter, Your Honor, just on the side.

6 But we have intense scrutiny in these cases in
7 public. We're going to have intense scrutiny as the criminal
8 cases march towards trial.

9 And what I'd ask the Court to consider is that there
10 could be a potential impact on those criminal trials --

11 THE COURT: Well, that's why you're here.

12 MR. RUSEK: Well, just in a more general sense of the
13 public, Your Honor, in trying these cases in the public. And
14 we want to avoid that as much as possible in a case with such
15 -- you know, it's a huge case, and it has wide-ranging
16 implications for all parties involved.

17 I'd ask that the Court just also consider that as we
18 start to fashion procedures that will ensure the rights of all
19 parties to these cases.

20 THE COURT: Well, thank you. And I -- thank you.

21 MR. RUSEK: Thank you, Your Honor.

22 THE COURT: Sure. So -- Mr. Mateo? Okay.

23 MR. MATEO: Good afternoon, Your Honor. Juan Mateo
24 appearing on behalf of Mr. Earley assisted here by -- with
25 Todd Perkins.

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1 Your Honor, in your original timeline, I think one of
2 the things that I want to point out is -- and Mr. Rusek just
3 addressed it.

4 As a representative of Darnell Earley, along with my
5 colleagues Todd Perkins, Gerald Evelyn, and Santino Mateo, we
6 have a duty to Mr. Earley.

7 THE COURT: Of course.

8 MR. MATEO: And that duty we need to be effective,
9 provide effective assistance under the Sixth Amendment of the
10 United States Constitution.

11 And one thing that I think I need to stress is when
12 Mr. Earley was deposed on July 30 and July 31, he went through
13 two days of deposition. He was asked questions by 15 lawyers.
14 They went over 64 exhibits, and he did not assert the Fifth.

15 THE COURT: Correct.

16 MR. MATEO: What we did not know at the time -- and
17 this is extremely important for you to understand on the whole
18 issue of whether there's a waiver here and on the issue of if
19 this is a single proceeding problem -- what we didn't know,
20 even though we had been in contact with the prosecution, Fadwa
21 Hammoud's office, we had met with her. We dealt with Kym
22 Worthy.

23 We exchanged correspondence. We had an understanding
24 that if we were going to proceed, they would let us know.
25 They never did. We did not know Mr. Earley had been indicted

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1 by a grand juror sitting in Genesee County on March of 2020,
2 months before that.

3 Had we known he had been indicted, had we known he
4 was the subject of a --

5 THE COURT: But you knew at the time of the
6 possibility of his indictment.

7 MR. MATEO: But think about what the defense team is
8 doing. We thought the statute of limitations had run in March
9 of 2020.

10 THE COURT: But, you know, in RE Convertino, the
11 statute had run with respect to Dave Ashenfelter's potential
12 charges then, as well. And the court said there's still a
13 possibility of criminal repercussions in that case, even
14 though the statute had run.

15 MR. MATEO: I understand.

16 THE COURT: So how is this any different?

17 MR. MATEO: It is different. Because to me the only
18 -- and this is an extremely unique factual situation. I
19 haven't seen any case out there where you have multiple
20 investigations, multiple sets of charges, and then you have
21 this deposition proceeding that occurs in between both
22 investigations.

23 THE COURT: It's a whole lot like the Moser v.
24 Heffington, Maryland Supreme Court case from 2019, a recent
25 case, too, where there was a deposition. It was in a civil

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1 case.

2 Later the question was, "Would the testimony be --
3 had the individual waived their rights by being deposed?" And
4 in the intervening time, there were criminal charges filed
5 against that civil defendant. It's very similar.

6 MR. MATEO: I'm not aware of that case, Your Honor.
7 I was going to say that the case that I think this is more
8 consistent with is the --

9 THE COURT: Excuse me. Who are you? Could you tell
10 me your name? You.

11 MR. LEVINE: I'm Randall Levine. I'm sorry, Judge.
12 I need my glasses, and they keep getting fogged up.

13 THE COURT: Okay. The reason I'm asking you is
14 because you keep taking your mask down. And for better or for
15 worse, we have a mask rule. And I'll ask that you leave the
16 courtroom if you can't leave it on.

17 Some of us have -- can't do it. And I don't have
18 mine right on now. I'm surrounded by Plexiglass. I'm 20
19 feet, 20 yards -- I'm something from you.

20 And so if you can't keep it on, you can watch on the
21 Zoom.

22 MR. LEVINE: I'll be more vigilant, Judge.

23 THE COURT: Okay. And also, I have my personal stash
24 here that I've purchased. If yours doesn't stay up, you can
25 just have one.

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1 Do you want one of mine?

2 MR. LEVINE: Oh, no. I can handle it, Judge. Thank
3 you.

4 THE COURT: Okay. Okay. Mr. Mateo.

5 MR. MATEO: Your Honor, I think this is more
6 consistent with the scenario that is -- that Judge Lawson
7 wrote about in the Sanford case.

8 He relied on -- one of the Supreme Court cases he
9 relied on was the Mitchell case. In Mitchell, you have a
10 defendant who pleads guilty to the case. And then at the
11 sentencing hearing, he's being asked questions that him and
12 his lawyer determine would further incriminate him, and he
13 asserts the Fifth Amendment.

14 And in that case, the Supreme Court said he was
15 entitled to assert the Fifth Amendment. I don't think the
16 analysis was it wasn't the same proceeding. I mean, I think
17 the analysis --

18 THE COURT: No. Because it was one deposition.

19 MR. MATEO: Right. But the analysis in the Mitchell
20 case was that, you know, things change. And, again, when you
21 come down to the issue, is there anything that the witness may
22 be asked that may tend to incriminate him or her. Then it is
23 logical for the defense to want to assert the Fifth.

24 And it's logical for the witness to assert the Fifth
25 Amendment. And that's something you should sustain.

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1 So I do believe two things; that Mr. Earley has not
2 waived his Fifth Amendment right to remain silent in this
3 proceeding, because I think we now are in a different year.
4 This is a bellwether trial.

5 THE COURT: I've just got Mitchell up here. It says,
6 quote, "It is well established that a witness in a single
7 proceeding may not testify voluntarily about a subject and
8 then invoke the privilege against self-incrimination when
9 questioned about the details."

10 And what I thought Judge Lawson did with Davontae
11 Sanford it said these are -- he lists out the questions that
12 were asked. And then he analyzes it as these later questions
13 where Sanford asserted the Fifth Amendment were different in
14 nature from the earlier questions. So it's not a Mitchell
15 problem. Tell me where I'm wrong.

16 MR. MATEO: Well, I think our situation, as far as
17 the change in circumstances where we're now in a civil trial
18 -- and I understand this is a bellwether trial where the issue
19 is whether the engineering defendants before you violated
20 their standard of care, right?

21 THE COURT: Right.

22 MR. MATEO: The whole Flint Water Crisis litigation
23 involves, I believe, thousands of cases. And I think the
24 deposition that Mr. Earley was subjected to was to address all
25 of the cases that were out there.

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1 THE COURT: Correct.

2 MR. MATEO: My view of how we analyze a single
3 proceeding is this is not the same proceeding. We're in a
4 separate trial. This is not something that anyone --

5 THE COURT: But you just said yourself that he was
6 being deposed in all of the cases including this case.

7 MR. MATEO: But the point is, does that mean that he
8 waived his right to remain silent in the thousand cases? I
9 just don't understand the waiver issue that way.

10 I -- how could Mr. Earley waive his right against
11 self-incrimination when he didn't even know he was under
12 indictment at the time? How can he waive it now --

13 THE COURT: Well, that's the -- that's the issue -- I
14 wrote an opinion in 2019, November 7 of 2019, telling him he's
15 got a plausible fear of prosecution. "Hear me now, you have a
16 plausible fear of prosecution."

17 But why did I write that opinion? Because his
18 lawyers came forward and told me he had a plausible fear of
19 prosecution and that he wanted to assert -- they wanted me to
20 stay discovery so that they wouldn't be exposed to this choice
21 of whether to testify.

22 MR. MATEO: And your ruling was in November of 2019.
23 In our mind collectively as defense counsel, we thought --
24 and, again, I know you're going to refer to the Convertino
25 case, but we thought the statute of limitations was over as of

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1 March of 2020.

2 So even though there's this potential plausible risk,
3 when Mr. Earley sat down to testify, I had no idea he was
4 still under investigation, let alone a grand jury proceeding
5 where he'd been indicted.

6 THE COURT: But that might be a matter that you have
7 to take up with your client not -- because I put it right in
8 this opinion that --

9 MR. MATEO: You did, Your Honor. But I think --
10 aren't I looking at waiver way too broadly?

11 THE COURT: Okay.

12 MR. MATEO: You can do it any way you want, Judge.

13 But I think the challenge -- my notes say the
14 challenge you have is you need to balance these interests, the
15 constitutional interest of Mr. Earley, our obligation under
16 the Sixth Amendment to Mr. Earley, versus managing this trial.

17 What you have proposed --

18 THE COURT: And I'm not suggest -- it's an idea that
19 I'm throwing out. I don't know -- the law certainly doesn't
20 require it, because a waiver is a waiver. So I don't think
21 there's any cases that say if your demeanor changes, that
22 could be further incriminating.

23 I think if anything the cases say you can be
24 questioned in those same areas.

25 But, anyway, let's just say that this could

1 potentially be a way to do this that would --

2 MR. MATEO: Right. Right. And I think from a trial
3 management perspective, it kind of makes some sense. I do
4 think you do have the discretion on how you want to go
5 forward.

6 Our problem is -- and I have no issue with his
7 testimony being played, the videotape being played, those
8 exhibits being introduced in this trial. I have no issue with
9 that.

10 If we take the special proceeding and we go off the
11 record outside the presence of the jury and we get to the
12 point where you say, "According to VNA, they want to ask these
13 questions."

14 Now it's -- VNA issued the subpoena. One of the
15 concerns I have here is what's really going on. Mr. Earley
16 had already left office by the time they came on board. So he
17 has no personal knowledge, no direct contact with VNA, no
18 personal knowledge as to what happened after January 12, 2015,
19 when he left that position.

20 So and my fear is that if they -- we go into this
21 sidebar procedure, that they're going to want to ask questions
22 that go beyond the deposition that could implicate the pending
23 case.

24 But I think what you're saying is you would hear us
25 out and then you could make, you know, we would know what the

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1 questions are. We could confer with Mr. Earley. And then we,
2 as defense counsel, could either, you know, instruct them to
3 testify, instruct them not to testify.

4 But I think that's a major factor for us to deal with
5 as lawyers. We have the obligation to Mr. Earley.

6 THE COURT: Slow down a little bit.

7 MR. MATEO: Sorry?

8 THE COURT: Slow down a little bit.

9 MR. MATEO: Sorry.

10 But I think the procedure you're suggesting makes
11 common sense under this very difficult set of circumstances
12 that we have.

13 THE COURT: Okay. Thank you. And could you
14 articulate for me what further risk your client would be
15 exposed to by answering the very same questions that were put
16 forth in the deposition?

17 MR. MATEO: If he testifies about anything involving
18 his role regarding the Flint Water Crisis in open court, he is
19 charged with three --

20 THE COURT: Oh, he will be testifying via his
21 deposition --

22 MR. MATEO: Right.

23 THE COURT: -- so we know that.

24 MR. MATEO: And I'm talking about questions beyond
25 the deposition --

1 THE COURT: And I'm talking about just about the
2 deposition. Limit yourself now to just the deposition. What
3 if we just read the deposition but with the real person here.

4 MR. MATEO: Okay. If the procedure is you read the
5 questions read, he reads his response? I don't know how that
6 adds to the management of this trial, because that seems like
7 a robotic process.

8 Our fear regarding anything that he utters in open
9 court in this trial, you know, like the rights say, "Anything
10 you say can and will be used against you."

11 And so what could that be? Could he say something
12 that I have no idea he's going to say? And all of a sudden
13 the solicitor general's team thinks he has said something
14 that's incriminating? I can't predict how that would unfold.

15 But I can't predict that if there's anything that the
16 current investigating team thinks he said that may have tend
17 to incriminate him, that they will certainly try to use it.

18 So that does expose him to a problem, an independent
19 criminal case. And now -- and I think that's why your
20 procedure makes some sense or makes some sense as I understand
21 it, that we can control this as much as possible so that his
22 rights in the pending criminal case are not impacted.

23 THE COURT: Okay. Thank you, Mr. Mateo.

24 Who is going to argue next?

25 MR. RUSEK: I believe that's Mr. Swor, Your Honor.

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1 I'll vacate the table.

2 MR. SWOR: This is the first time I've been to the
3 right of anybody.

4 THE COURT: Yeah.

5 MR. SWOR: Your Honor, if I may?

6 THE COURT: You represent Mr. Ambrose?

7 MR. SWOR: I represent Gerald Ambrose.

8 THE COURT: And don't feel obligated to -- I mean,
9 I've got your brief. If you have something to say that hasn't
10 been said, feel free to focus on that.

11 MR. SWOR: Okay. You asked us, "us" being the
12 earlier iteration of us as witnesses, "What new risk does
13 Mr. Ambrose or the other defendants raise by testifying in
14 this case?"

15 Like Mr. Earley, Mr. Ambrose did not know that he had
16 already been indicted when he sat for his deposition.

17 THE COURT: And the focus for your argument that
18 would be helpful to me is your client for whatever reasons --
19 and I will not ask -- it waived his rights --

20 MR. SWOR: I.

21 THE COURT: Let me finish.

22 -- waived his rights at the deposition. And so I
23 want to know why that's not the same proceeding as the trial
24 in the same civil case where he was then a defendant and now
25 no longer a defendant, because he has settled his claims.

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1 So if -- waiver is waiver. So -- and you -- a
2 decision was made. There was a possibility, even a
3 probability of charges being filed, although Mr. Mateo said
4 for some clients, perhaps there was an incorrect assumption
5 that the statute had run.

6 MR. SWOR: Well, I don't think it's an incorrect
7 assumption the statute ran. But that's for Judge Kelly in the
8 Genesee County Circuit Court.

9 But this Court's finding that the defendants -- yeah,
10 I guess they were defendants then -- had a founded fear of
11 prosecution back in November of 2019 was raised as a shield at
12 that time.

13 What the analysis that the Court is applying right
14 now flips that and turns it into a sword to defeat the
15 presumption against a waiver. Because there is a presumption
16 against a waiver no matter what.

17 And the Court is required to indulge that waiver --
18 or to indulge that interpretation as Klein v. Harris, which is
19 -- underlies all the cases VNA cited. The Court indulges that
20 if the Court infers a waiver.

21 And I think it is an inference of a waiver, Judge,
22 and I think --

23 THE COURT: No, there was a waiver at the
24 depositions. There was absolutely a waiver. Not one question
25 was the Fifth Amendment right against self-incrimination

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1 invoked.

2 MR. SWOR: I think, Your Honor, you're reading the
3 waiver more broadly than the privilege, not vice versa. And I
4 think you have to read the privilege more broadly than the
5 waiver.

6 Because there has to be a knowing and intentional
7 waiver, because that's the way the rule works.

8 The Court put them on notice and their counsel --

9 THE COURT: They put me on notice. Let me be clear.
10 With -- by filing a motion saying, "Fifth Amendment, Fifth
11 Amendment. Risk of criminal prosecution. We're filing a
12 brief asking for relief and protection."

13 MR. SWOR: Yes.

14 THE COURT: Okay.

15 MR. SWOR: All right. Yeah.

16 And the assessment of that risk, okay, lay in the
17 previous charges.

18 THE COURT: I don't know what it lay in. They filed
19 the motion, and they pointed out to me that the solicitor
20 general had announced that she would be undertaking a detailed
21 and lengthy investigation and that additional charges and
22 similar charges could be filed.

23 MR. SWOR: Could be. And if they testify -- see,
24 here's the thing. Mr. Ambrose is charged right now in an
25 indictment in a count that arose as a result of the

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1 depositions in this trial.

2 THE COURT: Oh, you're saying that the one-man secret
3 grand jury looked at the deposition transcript and then
4 indicted him?

5 MR. SWOR: He didn't look at Mr. Ambrose's
6 deposition. VNA's principal who was -- I don't know how the
7 -- I don't know how Judge Newblatt -- and I will not use the
8 word, "one judge grand jury," because it's not in the statute.
9 It's a judicial inquiry. And I prickle -- it's one of those
10 few things I'm fastidious about.

11 These were -- these depositions were marked highly
12 confidential. The court put limits on who could attend the
13 depositions. And for whatever reason, Mr. Ambrose's civil
14 attorney did not attend the deposition of Mr. Nicholas. Okay.
15 That was after this Court's ruling. It was in December of
16 December 2019 --

17 THE COURT: Somebody's got a coat -- somebody's
18 trying to get a hold of somebody in that coat.

19 UNIDENTIFIED PERSON: I'm not going to sell out the
20 person who --

21 THE COURT: I don't care. I just -- you know, maybe
22 there's an urgent family need to get a hold of somebody.
23 That's Mr. Perkins?

24 MR. PERKINS: May I, Your Honor?

25 THE COURT: Please. I don't want you to miss the

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1 phone calls.

2 Okay. Mr. Swor, focus on anything that has not been
3 said. Your Honor, the fact is Mr. Ambrose was criminally
4 charged after his deposition. But the deposition -- he's
5 charged in this -- in the -- now, see, I was all clever.

6 I had a timeline drawn out, and I was going to
7 mesmerize you with my --

8 THE COURT: Yeah, I threw you off.

9 MR. SWOR: Which is not hard to do.

10 THE COURT: Why don't -- I've got an idea.

11 Do you want to give it some thought and I'll --
12 you're Mr. Quigg?

13 MR. QUIGG: Charlie Quigg, Your Honor. Yes.

14 THE COURT: We'll go to him for now.

15 MR. SWOR: Yeah.

16 THE COURT: Would that work?

17 MR. SWOR: Let me -- go.

18 THE COURT: Okay. Great. Because we've covered a
19 lot of territory already.

20 MR. QUIGG: Thank you, Your Honor. I'm Charlie
21 Quigg. I'm here on behalf of Governor Snyder.

22 THE COURT: Thank you.

23 MR. QUIGG: Let me -- let me start at the end and
24 then just hit a couple of points on how we get there.

25 Your Honor outlined an idea for how we might proceed.

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1 Play the deposition video for questions at the deposition.
2 Have a hearing outside the presence of the jury where VNA and
3 LAN set out the additional questions they'd like to ask the
4 witnesses, so we can adjudicate the Fifth Amendment issues at
5 that time.

6 And obviously subject to discussion with our client,
7 I think that process is workable. I'll be up front with
8 you --

9 THE COURT: I'm not promising that when I hear from
10 them that that's what we'll do. Because I think there are
11 cases out there that talk about -- I mean, they're within the
12 jurisdiction of the Court. They can be called live. If
13 they've waived, they've waived.

14 But still, I think it may be a way to solve the
15 problem. So we'll hear from VNA and LAN about that.

16 MR. QUIGG: Right. And so that's how we get there.
17 And just on your idea, I will just caveat, obviously, we don't
18 know what VNA and LAN will put before you at this point. But
19 I will say based on their notice of nonparties at fault, what
20 they identified in their response to our motion.

21 And the really breathtakingly broad charges that
22 Governor Snyder is now facing, it's hard for me to imagine
23 that any additional questions that they conceivably might want
24 to ask wouldn't be incriminating. But --

25 THE COURT: I hear you. We'd have to figure out what

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1 it is.

2 MR. QUIGG: Right. Understood.

3 So then let's talk about how we get there. Because
4 Your Honor has expressed some hesitation with the concept that
5 there hasn't been a waiver here.

6 THE COURT: I'm having a hard time with that, yes.

7 MR. QUIGG: I have heard that. And I understand.
8 And I think there's a natural inclination among lawyers, at
9 least criminal defense lawyers, they're so sensitive to Fifth
10 Amendment waiver issues that they almost automatically treat
11 them -- treat a waiver of the Fifth Amendment as irrevocable.

12 But if you look at the case law, that's really not
13 the case. Thing number one is the Sixth Circuit and the
14 Supreme Court have both recognized that courts have to indulge
15 every reasonable presumption against a waiver. So that's kind
16 of the background --

17 THE COURT: How could I find that there was not a
18 waiver -- I mean, Mr. Swor suggested that's not -- answering
19 two and sometimes three days of questions and never once
20 saying, "I plead the Fifth," how is that possibly not a waiver
21 knowing full well that there's an investigation underway that
22 could be brought.

23 And specifically that the governor's office wouldn't
24 have control over document production and so on.

25 MR. QUIGG: Well, certainly, Your Honor, it was a

1 waiver as to the deposition transcript as Mr. Rusek noted. No
2 one is saying that the deposition transcript or deposition
3 video can't be played before the jury.

4 And, you know, it's kind of interesting. There
5 really are not a ton of directly on-point cases. State v.
6 Roberts on the one hand from the Supreme Court of New
7 Hampshire and then Moser versus Heffington from the Maryland
8 Supreme Court, I think --

9 THE COURT: Yes.

10 MR. QUIGG: -- is the name of the highest court in
11 Maryland.

12 THE COURT: Tell me the State v. Roberts Connecticut
13 case, I read that. It certainly says a deposition --
14 testimony at a deposition and later trial in the same civil
15 case were different proceedings. But it said because the
16 trial testimony could further implicate the witness.

17 And from my perspective, it seemed that that court
18 was saying the trial testimony could go beyond the questions
19 at the deposition and further implicate. The word "further"
20 seems important.

21 Because certainly if your -- from my perspective,
22 there certainly was a waiver at the earlier deposition, and
23 all we have to figure out is are we in the same proceeding or
24 not.

25 MR. QUIGG: Sure. So -- well, let me answer that a

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1 couple of different ways.

2 So way number one is I think to figure out the answer
3 to this problem on which we really don't have a ton of case
4 law, you have to look at the policies behind the waiver rule.
5 And the policy, as the Supreme Court in Mitchell told us, is
6 you can't let a witness control the narrative.

7 If they testify as to a favorable fact on direct,
8 they should be able to be cross-examined about --

9 THE COURT: -- that fact.

10 MR. QUIGG: -- the details of that fact on cross.

11 And that policy really has no force here. Because
12 Governor Snyder, for instance, was deposed for two days.
13 There's 831 pages of deposition transcript. And the details
14 have already been fully ventilated at his deposition. No one
15 was prevented from asking any questions. VNA's counsel --

16 THE COURT: VNA says they only got an hour and a half
17 or something.

18 MR. QUIGG: VNA -- VNA ended their questioning before
19 they --

20 THE COURT: Before the time.

21 MR. QUIGG: You may recall, Your Honor, there was
22 some dispute among the lawyers --

23 THE COURT: I do recall.

24 MR. QUIGG: -- we weren't there -- early on in the
25 deposition that turned out to be moot, because the deposition

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1 ended early.

2 THE COURT: Well, I'll certainly ask, "If you have
3 more questions, why didn't you ask them?"

4 MR. QUIGG: Yeah. And VNA's counsel, I'll just read
5 from the conclusion of their examination of Governor Snyder.

6 The lawyer representing VNA was in Pinehurst,
7 North Carolina, and said to Governor Snyder, quote, "So,
8 Governor, I'm looking at all of these people playing golf out
9 of my window, and I'm getting kind of antsy. So I'm going to
10 suspend my examination of you, reserving whatever time I have
11 left, and pass you on to the next lawyer in line."

12 So the rationale behind the waiver rule, the
13 animating principal for the waiver rule, setting aside
14 separate or successive proceedings, has no force here.

15 So then you couple that with the policy behind the
16 single proceeding rule. And as the Sixth Circuit recognized
17 in Morganroth, one reason that courts say a waiver applies
18 only within the confines of a single proceeding is that
19 conditions might change between the two proceedings.

20 And as to Governor Snyder, the case presents a
21 textbook illustration for why that might be. As of -- did you
22 have a question, Your Honor?

23 THE COURT: No, no, no. I was just going to go open
24 the case.

25 MR. QUIGG: Sure.

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1 At the time of his deposition in June of 2020, the
2 Flint Water Crisis had been under investigation for more than
3 three years. He, Governor Snyder, hadn't been charged with a
4 crime.

5 And, in fact, the crimes with which he ultimately was
6 charged, if you were to look at prevailing Michigan law as of
7 June of 2020, you would have said his fear of prosecution was
8 imaginary. Because they -- the duties he's charged with
9 neglecting are discretionary duties, not the type of duties
10 that are within the scope of the Michigan criminal statute.

11 But here we are a couple of years later. He now is
12 under indictment for those charges.

13 And on top of that when we're talking about how we
14 work through this practical problem going forward, the
15 indictment is almost completely bare of details. There are
16 really no facts in the indictment from which to charge what
17 might be incriminating or not.

18 THE COURT: I can't take any position. I know
19 nothing about the criminal investigation or what might have
20 lead to that. I have no contact with it, no knowledge,
21 nothing at all.

22 All I know is that the risks in summer 2020 when the
23 deposition was taken were known risks. And in light of the
24 broad public relations effort to say, "We are still
25 considering and investigating criminal charges and expanding

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1 those charges."

2 So from my perspective, your client had a serious
3 risk, a plausible risk of prosecution at that time.

4 MR. QUIGG: So let me address that briefly, Your
5 Honor.

6 Certainly was there a possibility of some charge, a
7 narrower charge? Yes. But I think it's difficult to judge an
8 invocation of the privilege unless you have an understanding
9 of the scope of the potential charge.

10 THE COURT: But I think you're creating a rule that
11 would allow people to waive their Fifth Amendment rights. And
12 then if subsequent charges don't match exactly what their
13 subjective belief was and what they would look like, then they
14 can invoke it at the next stage of the proceeding.

15 MR. QUIGG: I agree with you, Your Honor. A
16 subjective belief -- a rule based on subjective belief would
17 be problematic.

18 But I would just point the Court to the Michigan
19 Court of Appeals published decision in People v. Waterstone
20 cited in our brief which objectively would lead a court, as of
21 2020, to conclude that a public official such as the governor,
22 especially the governor, couldn't be charged with willfully
23 neglecting the duties he ultimately was charged with
24 neglecting.

25 So let me -- unless you have a question, Your Honor.

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1 THE COURT: No, I don't.

2 MR. QUIGG: So let me address the second thing that
3 was embedded in your question. I think, which is how is it
4 possible that asking him the exact same questions in 2022
5 could further incriminate him?

6 THE COURT: And I don't even truly know if that's the
7 right question. Because if he waived his Fifth Amendment
8 rights in the summer of 2020, it's fair game. He's waived it,
9 and it's fair game to ask him questions, the same questions or
10 very similarly phrased questions on the same areas.

11 But go ahead. But let's assume that I still am
12 interested in that.

13 MR. QUIGG: Sure.

14 So a couple of responses. So thing number one is as
15 the Second Circuit recognized in Miranti and the Sixth Circuit
16 acknowledged in Morganroth following Miranti, reiterating
17 testimony, even if it's the exact same testimony, adds to the
18 credibility of the statement and makes it harder for someone
19 to discount that statement later.

20 So, you know, here hypothetically imagine a future
21 criminal trial, Governor Snyder gives exactly the same
22 testimony in 2022 that he gave in 2020, Your Honor can imagine
23 how that potentially could give the prosecution more ammo.

24 Not only did you testify to this fact in 2020, but
25 you independently testified to it again in 2022.

1 THE COURT: I have a hard time following how that
2 would expose -- I mean, I hear your argument. I understand
3 your argument. But I think those are the calculations you
4 have to take into consideration when you waive your rights in
5 the first instance.

6 But go ahead.

7 MR. QUIGG: Well, and so then not only that, Your
8 Honor, but questions don't waive the privilege; answers do.

9 And there is no way practically for Governor Snyder
10 or me or you on the fly to determine if he's going to give the
11 same answer that he gave --

12 THE COURT: Well, and he doesn't have to. In terms
13 of the Mitchell case and others, if he's actually waived his
14 Fifth Amendment rights in the first -- in the deposition, it's
15 part of the same proceeding. The law says in that -- in the
16 instance of waiver, he can fairly be asked those questions and
17 similar questions on the same topics at a subsequent hearing
18 in the same proceeding.

19 MR. QUIGG: Well, certainly within the same
20 proceeding. I guess --

21 THE COURT: And that's what we're here to figure out.
22 Is this civil deposition the same proceeding.

23 MR. QUIGG: And just one more point, Your Honor. The
24 important caveat, at least in this circuit, and I think there
25 is a circuit split on this issue -- is topics -- answering a

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1 single question on a particular topic in the Sixth Circuit
2 does not open the door to all questions on that topic.

3 Go back to LaRiche, which has been reiterated more
4 recently, I think, including in Convertino. Even after one
5 answers a question on --

6 THE COURT: In Convertino, there were no answers on
7 any record. There was only a confidential affidavit provided
8 to the Court or sealed affidavit.

9 MR. QUIGG: Right. But I -- yes, Your Honor. But I
10 -- and I could be misremembering. But I believe that
11 Convertino recognized the principle that the Sixth Circuit
12 initially adopted in LaRiche -- or I can't say initially --
13 but adopted in LaRiche that even after answering a question on
14 a topic, the Court still has to determine whether further
15 questions and further answers would be --

16 THE COURT: Would open the door to incrimination,
17 yes.

18 MR. QUIGG: Right. And that -- that also, I think,
19 gets to why asking the same questions today might lead to
20 further incrimination.

21 We don't know -- I mean, it's just impossible to say
22 whether answers will be the same in 2022 as they were in 2020.
23 People's memories change. They remember different things.

24 And it's conceivable that an answer to the very same
25 question might be different and then we'll have VNA arguing,

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1 "Well, they opened the door to" --

2 THE COURT: Well, the perjury thing we don't have to
3 worry about, because we understand that that's not a basis for
4 refusing to testify.

5 MR. QUIGG: Yes. I'm making a slightly different
6 point, Your Honor --

7 THE COURT: Okay.

8 MR. QUIGG: -- which is let's say question in 2020,
9 answer is X. And that opens the door to a certain scope of
10 questioning.

11 THE COURT: Show me a case that says that let's
12 assume it's a single proceeding that waiving the rights
13 initially that they can be exercised with respect to the same
14 or similar questions on the same topics?

15 MR. QUIGG: Well, I don't think there -- I don't
16 think there is such a case, Your Honor, because typically in a
17 -- typically you're talking about something that is clearly a
18 single proceeding. So the same question won't be asked
19 multiple times.

20 THE COURT: I know. But now you're just disagreeing
21 on the single proceeding as opposed to on waiver. Because the
22 Mitchell case tells us if you waive in an area, then that's
23 your waiver. And the details in a particular area still have
24 to be answered in the subsequent testimony.

25 So I think you're collapsing back into these are two

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1 different proceedings.

2 MR. QUIGG: Perhaps. I was --

3 THE COURT: And I think I might be guilty of
4 contributing to that by asking the question of "How would it
5 harm you?"

6 Because I'm just curious in that answer, how would it
7 harm you to answer the same questions in light of the fact
8 that no one's trying to stop us from playing the depositions.

9 MR. QUIGG: Well, Your Honor, I think the calculus is
10 different. If we were talking about a trial and a witness
11 were called and he was asked a question on direct and for
12 whatever reason was asked the same question on cross, that's,
13 I would submit, materially different from the scenario that
14 we're looking at where we're dealing with testimony separated
15 by who knows, likely at least two years in our case.

16 I don't know when --

17 THE COURT: So you're just saying memory issues and
18 so on could impact the answer?

19 MR. QUIGG: Well, that. And I really do think there
20 is something to the Second Circuit's recognition in Miranti
21 that reiteration itself, even if it's verbatim the same, adds
22 credibility to a statement and makes it more difficult to
23 discount later.

24 THE COURT: Okay. Thank you. Is there anything
25 further right now?

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1 MR. QUIGG: Nothing further right now, Your Honor.

2 THE COURT: Okay. Thank you, very much. And is
3 there any further argument? There's Mr. Baird. That's
4 Mr. Levine.

5 MR. QUIGG: I believe so, Your Honor.

6 THE COURT: Yeah.

7 Thank you for wearing the mask, Mr. Levine.

8 MR. LEVINE: I'm sorry, Judge. You're welcome. And
9 I'm sorry for doing it and letting it fall.

10 THE COURT: That's okay.

11 MR. LEVINE: May I remove it?

12 THE COURT: Yes.

13 MR. LEVINE: Judge, good afternoon. I'm Randall
14 Levine from Kalamazoo, and Rich Baird's lawyer.

15 THE COURT: Good. Thank you.

16 MR. LEVINE: I've never been before you before.

17 THE COURT: I don't recall that, so I would agree.

18 MR. LEVINE: But I've been at this 40 years. And I
19 can tell you that I've never seen a situation factually that's
20 like this. And I don't know that the cases that have been
21 spoken about by the counsel who have sat here before are
22 necessarily that helpful.

23 The Court, when it initially spoke to the group
24 today, said, "I'm going to lay out some facts, and tell me if
25 there's anything about those facts that doesn't -- aren't as

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1 inaccurate."

2 You're shaking your head, so I presume you know what
3 I'm talking about.

4 THE COURT: Yes. I remember that.

5 MR. LEVINE: Okay. Well, I'm new to this party. I
6 don't really know very much about this case at all. When the
7 Court said that I received a notice of nonparty at fault that
8 includes Mr. Baird, I've never received a notice of nonparty
9 at fault that --

10 THE COURT: No. You're not on the docket. Even as
11 of today, you haven't filed an appearance. Somebody at your
12 firm did.

13 So go ahead.

14 But no, I didn't mean to imply that you were on the
15 docket receiving the orders. But they're certainly on Westlaw
16 at any time -- or at least the November 7 order in 2019 was on
17 Westlaw. The nonparty at fault would be on the ECF docket --
18 public docket.

19 But I don't really think the nonparty at fault
20 matters too much. I just indicate that, because there was all
21 this talk of so-called gamesmanship in trying to bring these
22 witnesses up here to shift blame away from VNA and LAN.

23 But we're -- all the rest of the parties were
24 notified in 2018 and '19 that they are going to take advantage
25 of Michigan's fair share liability scheme. And so I only

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1 mentioned that.

2 MR. LEVINE: Okay. Well, I was just --

3 THE COURT: It's really not relevant.

4 MR. LEVINE: That's fine. And maybe I should cut to
5 the chase, because I know we've been here a long time. So
6 I'll do as Mr. -- the lawyer who proceeded me said. I'll
7 start from the end.

8 THE COURT: Okay.

9 MR. LEVINE: I don't have a problem on behalf of
10 Mr. Baird with the proposal that's been discussed where the
11 Court plays the deposition testimony and then we deal outside
12 the presence of the jury with potentially other incriminating
13 evidence and whether or not there's an entitlement for the
14 invocation of the privilege. Okay?

15 THE COURT: Okay.

16 MR. LEVINE: So just to get there.

17 I don't dispute that sitting for the deposition
18 constituted a waiver. The problem that I have, though, is
19 what -- if I had known back then at the deposition what I know
20 now, I certainly would have invoked the privilege.

21 THE COURT: Well, that's how -- that's life.

22 MR. LEVINE: I understand, Judge. But, Judge --

23 THE COURT: I mean, I can't -- that can't be the
24 standard that if I knew what I knew now, I would not have
25 waived my rights.

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1 Because people testify before the grand jury all the
2 time and later get indicted. Well, those are criminal cases.
3 But that just simply be the standard.

4 MR. LEVINE: And I understand that. And I'm not
5 suggesting. I'm trying to make a record, and I'll do this,
6 you know, as expeditiously as I can.

7 My situation is somewhat different than the other
8 defendants. When I say, "my situation," I mean Mr. Baird's
9 situation --

10 THE COURT: You know, I think your situation is in
11 some ways less sympathetic than the other defendants for the
12 following reasons. Which is at the time that the other
13 witnesses, then defendants, sat for their deposition, they had
14 to make a difficult decision.

15 Do they risk an adverse inference in the civil
16 litigation that they're a part of, or do they testify and
17 avoid the adverse inference and waive their Fifth Amendment
18 rights?

19 Your client was not a defendant. He faced no risk in
20 our litigation when he answered, I assume, a subpoena and a
21 notice of deposition and was sworn in and answered all the
22 questions.

23 MR. LEVINE: From a civil perspective, I absolutely
24 agree. He's better off.

25 But, Judge, he's charged with extortion. He's

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1 charged with a 20-year felony. I'm obligated to afford him
2 his Sixth Amendment right to effective representation and
3 zealously advocating his right to claim of privilege at this
4 point.

5 And my position is, and so the record is clear, Your
6 Honor, and I'm not trying to argue with you, but I want my
7 position to be crystal clear on this. I don't believe even
8 though he waived his privilege and sat for a deposition,
9 that's a waiver in perpetuity.

10 I don't believe because I believe the Fifth
11 Amendment --

12 THE COURT: But when would the waiver stop?

13 MR. LEVINE: It stops at the end of the deposition.
14 And this is why, Judge --

15 THE COURT: But so you're suggesting that all of
16 these cases that talk about, for instance, in a civil case if
17 you testify in your deposition, that you can still get up here
18 and say, "Oh, I'm not going to testify here."

19 Whether or not there are criminal charges in the
20 intervening months, you're -- that's the rule.

21 MR. LEVINE: In the Sixth Circuit, I don't think
22 that's been established, and I think that the fact that he
23 waived at the deposition is not a waiver in perpetuity.

24 And I think that no one, Your Honor, not a prosecutor
25 or not a civil lawyer in another case can compel a person

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1 who's under the indictment that Mr. Baird is under facing
2 serious criminal charges with serious penalties on absolutely
3 a vague indictment.

4 And if the Court would just allow me to be heard on
5 this.

6 THE COURT: Sure. I did read the indictments.

7 But go ahead.

8 MR. LEVINE: Okay. Do you have it in front of you?

9 THE COURT: I believe I do.

10 MR. LEVINE: Because I can give it to you.

11 THE COURT: Oh, no. I've got it. And I've got it on
12 the screen if I just do a couple more clicks.

13 But go ahead.

14 MR. LEVINE: So just by way of background, Your
15 Honor --

16 THE COURT: Just one second. I've got it.

17 MR. LEVINE: Yeah.

18 THE COURT: Go ahead.

19 MR. LEVINE: So that you have context, Your Honor,
20 for what I'm about to say concerning the indictment which
21 you've now put in front of you.

22 Mr. Baird was involved from the very beginning. He
23 was my client in the Flint water investigation. And he for
24 four days offered testimony under oath relating to matters
25 involving the Flint Water Crisis.

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1 His first appearance under oath was in February of
2 2017 when he testified a full day at an investigative subpoena
3 hearing --

4 THE COURT: Yeah. That's another interesting factor
5 that makes his waiver all the more knowing. He waived
6 multiple times. But I'm not suggesting that's the same -- the
7 investigation is the same proceeding as our civil case.

8 MR. LEVINE: Okay, Your Honor. Thank you.

9 He sat again on the 1st of March of 2017 for a second
10 full day of investigative subpoena. And then there were two
11 days of depositions on the 21st and on the 22nd of July.

12 And he did so at that time without invoking a
13 privilege, because he feared nothing, because he had the right
14 to rely on representations that the government made to me when
15 he -- when the investigative subpoenas proceeding was ongoing,
16 that he was not a target, that he was a witness and that the
17 government was not looking to indict him.

18 That -- that informed my decision. Judge, I've been
19 defending people for 40 years, as I said. And I didn't mean
20 to say -- I wouldn't -- if I would have known then what I know
21 now, this is kind of what I was getting at. I was -- had a
22 right to rely on the government representations, and I did.

23 But all of that changed dramatically for Mr. Baird
24 in --

25 THE COURT: But the Convertino case, there was an

1 argument by Convertino that the Attorney General Eric Holder,
2 I think, at the time had said, "We will not prosecute journal
3 itself for doing their job."

4 And the court said that those guarantees don't -- do
5 not override the Fifth Amendment waiver. So the fact that you
6 heard from someone -- from the prosecutor that your client
7 wasn't a target at that time, there's a new prosecutor as of
8 the time of these depositions, and you knew that.

9 MR. LEVINE: I knew it, Judge. But, Judge, I was one
10 witness of several, I don't know, how many hundreds of people
11 were subpoenaed. I had no reason ever to believe outside some
12 sensational journalism that appeared to castigate his
13 integrity that he would be criminally charged.

14 THE COURT: I know.

15 MR. LEVINE: But he became charged. He became
16 charged. And I'm admitting that when he -- I was with him,
17 and I counseled him. And even though he was represented at
18 the time by the Attorney General in a civil deposition, I was
19 there.

20 And the reason I was there was to make sure that he
21 was -- his rights were protected and that there's a waiver. I
22 know it. But when you look at this indictment now, you
23 can understand and appreciate the position I'm in.

24 THE COURT: Well, this is not so much about you.

25 MR. LEVINE: Mr. Baird. I misspoke.

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1 THE COURT: Okay. But what I'm hearing from a number
2 of people who have spoken so far is, "My client has the right
3 to the effective assistance of a lawyer, and these are the
4 decisions I, as counsel, made."

5 I appreciate your need to defend your decision or
6 your interest in defending that. But what I'm most interested
7 in is whether this is a single proceeding. That's what I'm
8 interested in.

9 MR. LEVINE: Well, Judge, I think it's different
10 stages. And I think he's entitled at the stage that we're at
11 now to assert a Fifth Amendment privilege, and that's why I
12 was going to talk a little bit if you would allow me --

13 THE COURT: Sure.

14 MR. LEVINE: -- about the indictment.

15 THE COURT: Okay. Well, the indictment's not in our
16 case. We're not --

17 MR. LEVINE: It's informing my decision, and it's the
18 basis upon which I am asserting to this Court that he has the
19 right to take the Fifth Amendment at trial on anything beyond
20 his deposition testimony.

21 THE COURT: Okay. Thank you.

22 MR. LEVINE: This is an indictment that charges him
23 over a 37-month period from --

24 THE COURT: No, I understand that. I'm interested in
25 waiver. I'm -- whether the earlier deposition -- I know. I

1 read the indictment. Jiminy Cricket, I wouldn't want to be in
2 his shoes.

3 So I'm not suggesting -- I don't -- okay. Go ahead.
4 We can discuss the indictment. But the fact is when he
5 testified earlier, there was a possibility of an indictment.
6 Why did he ask if he was a target even before that?

7 MR. LEVINE: Well, Judge, when you're subpoenaed by a
8 special prosecutor in an investigative subpoena proceeding,
9 you determine if you are doing your job, whether or not you
10 are a target of the investigation before you decide to
11 testify.

12 Because if you're a target, you have the opportunity
13 to invoke the Fifth Amendment. If you're not, you don't.

14 THE COURT: Okay. All right. We may need -- this
15 might be a good time to take a short break. And what I should
16 tell you is I do have two more criminal cases today -- or not
17 more. Two criminal cases this afternoon. So we might start
18 to speed it up a little bit.

19 So let's take about just a five minute break and then
20 come back.

21 (Brief Recess)

22 THE COURT: Please be seated. This might be a good
23 time for me to remind counsel on the bellwether cases that
24 transcripts cannot be shared when they're under the 90 days
25 from when they're docketed. So otherwise people just pay for

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1 the transcript, and we move along.

2 So go ahead. That didn't relate to you at all.

3 MR. LEVINE: Thank you. I think I -- I want to be
4 sensitive to the Court's time. And so I'm going to be -- I'm
5 going to wrap it up, and I'm going to be brief.

6 THE COURT: Okay.

7 MR. LEVINE: I think the Court understands my
8 position. The bottom line is because of the vague indictment
9 -- and I won't go into the counts and the complete lack of
10 specificity in any of the counts, particularly 2 and 3, which
11 potentially expose Mr. Baird to criminal liability for any
12 discretionary decision he made to use state resources or state
13 personnel or in any way a decision he made that may in Count 3
14 interfere with any legal proceeding.

15 We don't even know which legal proceeding.

16 I mean it is -- this indictment I've never seen an
17 indictment like this in my life. It is so broad and open
18 ended that the Court -- doesn't take a great stretch of the
19 imagination for the Court to see that I have legitimate
20 concerns that if Mr. Baird were to take a witness stand at
21 this time and ask any question at all, he could potentially be
22 -- incriminate himself.

23 And so for all intents and purposes, he is
24 unavailable, because I believe nobody can force him at this
25 point to testify. Certainly a civil lawyer can't call him and

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1 force him to waive his privilege. I believe that he waived
2 the privilege in the deposition, but it ends there.

3 THE COURT: Excuse me. Excuse me. Stop. Stop
4 talking, please.

5 MR. LEVINE: Yes.

6 THE COURT: That's what we're here for.

7 MR. LEVINE: Yes.

8 THE COURT: Somebody can force him to testify --

9 MR. LEVINE: Well, that was --

10 THE COURT: -- and it may not be me. It may be the
11 Court of Appeals. I don't know. I haven't made my decision.
12 But I think it's worth knowing that.

13 MR. LEVINE: And I apologize, Your Honor.

14 THE COURT: Okay.

15 MR. LEVINE: In my zeal, I overstated what I meant to
16 say.

17 THE COURT: Okay.

18 MR. LEVINE: Okay.

19 THE COURT: And you're talking to someone who takes
20 the Fifth Amendment and all of -- anyone in my position should
21 and in all of yours -- who takes this right very seriously.

22 MR. LEVINE: Thank you.

23 THE COURT: So I'm not approaching this with a
24 cavalier attitude.

25 MR. LEVINE: Thank you.

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1 THE COURT: Okay.

2 MR. LEVINE: And I appreciate that. I don't know
3 you, Judge. I've never been in front of you, and I'm learning
4 a little bit about how you operate.

5 THE COURT: Okay.

6 MR. LEVINE: And I know -- I've already seen and I
7 don't want to sit here and waste your time. And so what I'm
8 going to end with is this, the rules provide a remedy for
9 what's going on here.

10 If he invokes a privilege, the Court could play -- he
11 could -- he becomes unavailable, and the Court is free to play
12 his deposition testimony for the jury.

13 To the extent that the Court is under the opinion
14 that other questions beyond what was in the deposition may
15 incriminate him, I think a hearing would be appropriate at
16 that point, and I certainly would appear at that time.

17 THE COURT: Thank you --

18 MR. LEVINE: Thank you, Judge.

19 THE COURT: -- very much. And so now put the mask
20 back on.

21 MR. LEVINE: Yes, of course.

22 THE COURT: Is anyone else. No one else is --

23 MR. RUSEK: Your Honor, if I may just have rebuttal.

24 THE COURT: Yes. Mr. Swor, is there something
25 different from all that's been said that you'd like to offer?

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1 But you'll have to do it into the microphone.

2 MR. SWOR: Your Honor, it is our opinion -- it is my
3 opinion, that this is clearly not a single proceeding. Okay.
4 That these are separate proceedings.

5 THE COURT: Why?

6 MR. SWOR: Well, there's case law that says so.

7 THE COURT: Where? That's what we're --

8 MR. SWOR: Let me see. In our brief -- if I had my
9 glasses --

10 THE COURT: That's okay. I read the brief. No
11 problem.

12 MR. SWOR: In our brief. Secondly, you know, under
13 804 -- I think it's 804 -- this is a separate proceeding.
14 This is -- there has been a change of circumstances.

15 Our clients are no longer parties. They are
16 witnesses. And their testimony here is not voluntary, whereas
17 their testimony, the Court has said their previous testimony
18 was a voluntary waiver, and that starts and ends there. And
19 that can be used there.

20 THE COURT: Okay.

21 MR. SWOR: But now they're not parties. They are
22 potential witnesses or they are -- they're subpoenaed
23 witnesses. They are people in a different situation. Their
24 testimony is not part and parcel.

25 You know, part of the idea of not allowing to waive

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1 at one step and -- or to waive at one step and then not or --
2 boy, am I doing bad today.

3 THE COURT: That's okay.

4 MR. SWOR: Is to -- so that the trier of fact is not
5 left with a half-view of the evidence. Okay. They're not
6 going to be a half-view of the evidence. I mean, the Court
7 wants to use their deposition. That's one thing if they're
8 unavailable.

9 But to bring them in here, you know, first of all,
10 you've got to figure out what deposition testimony is
11 relevant?

12 THE COURT: Okay.

13 MR. SWOR: Because that's a -- and that's really one
14 of the distinctive parts, why a deposition is a different
15 proceeding. Because I can guarantee you that if you had read
16 the two days of testimony of Mr. Ambrose's deposition, there
17 was a lot of stuff that would have nothing to do with the
18 trial that in no way would be admissible.

19 So it wouldn't even be a -- I'm going to stop
20 talking.

21 THE COURT: Okay.

22 MR. SWOR: But I want to be sure that I preserved our
23 position that this is a separate proceeding. And if the Court
24 rules, we're going to ask for a stay.

25 THE COURT: Okay. That has been well preserved.

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1 MR. SWOR: Thank you. Well, it's been preserved. I
2 don't know how well.

3 THE COURT: Well, it's thoroughly preserved.

4 Okay. So we'll now move to VNA.

5 MR. CHRISTIAN: Good afternoon, Your Honor. Marcus
6 Christian on behalf of VNA. This is a case where the -- as
7 you've stated, the witnesses took the stand in deposition.
8 They gave testimony. They didn't invoke the Fifth. They have
9 waived the Fifth Amendment as to their testimony, the topics
10 of the deposition.

11 We further state and argue as we have in our filings
12 that this is the same proceedings. It's the same claims, same
13 parties, same judge.

14 THE COURT: Does it matter that in this proceeding
15 the trial or this portion of the proceeding, if it's the same,
16 that it's two years apart? That a witness could testify -- we
17 heard from their lawyers. They might testify differently in
18 response to the same question, and that perhaps they didn't
19 waive that in the first deposition?

20 MR. CHRISTIAN: We argue that it does not, Your
21 Honor. And it sounds like that's just way to render these
22 individuals unavailable by some possibility that they may say
23 something different in response to a question.

24 That doesn't undo waiver. There's no case law that
25 suggests that the possibility, the remote possibility that

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1 someone may say something different in response to the same
2 question or substantially the same question somehow nullifies
3 the waiver and renders them unavailable to testify.

4 THE COURT: Yeah, I don't know of any, but I heard
5 the argument made earlier.

6 MR. CHRISTIAN: And further on that point, Your
7 Honor, we take the position that there's no basis here, given
8 our position of the waiver, as well as the single proceeding
9 that there should be testimony played from the deposition as
10 opposed to having the live witnesses.

11 THE COURT: What's the benefit to you to having the
12 live witnesses? If you're allowed to ask live witnesses your
13 additional questions, what's wrong with asking instead of
14 having, like, having the deposition transcript out and reading
15 from it more or less? What's the benefit of having them here
16 live if they'll be here live for your additional questions
17 where there's not further exposure?

18 MR. CHRISTIAN: Well, Your Honor, we suggest live
19 testimony is different from recorded testimony. It gives the
20 jury an opportunity to gauge the credibility of the witnesses,
21 which is a hallmark of our judicial system.

22 And not only is this recorded testimony, this is Zoom
23 testimony. And so it is also subject to all of the technical
24 glitches and other difficulties that have become common
25 content for jokes --

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1 THE COURT: Were there problems in these witness's
2 depositions?

3 MR. CHRISTIAN: I can tell you that there must have
4 been people saying, "Oh, sorry. You're on mute."

5 I'm just giving you example. But, Your Honor, still
6 even if they were crystal clear, they do not replace the role
7 of the jury to judge the credibility of the witnesses. And
8 that --

9 THE COURT: What if the witnesses decide not to take
10 their masks off here? Their masks were off in the Zoom video
11 deps, so the jury would see their facial expressions. But
12 here they could say, "I'm concerned about COVID. That's a
13 legitimate concern, and I'm not going to take my mask off."

14 MR. CHRISTIAN: Absolutely, Your Honor. And still
15 even then, they still have body language that can be read by
16 the jury. Just not the part of their face that is covered and
17 their tone of their voice, the timing.

18 There are so many aspects of live testimony that go
19 beyond what can be seen beyond the mask.

20 THE COURT: Okay. And so your main argument is the
21 jury's benefit to seeing live testimony to assess credibility?

22 MR. CHRISTIAN: That's a part of the argument, Your
23 Honor. I mean, there have been many people opining since the
24 pandemic began about how judges and juries and courts can save
25 time by having online trials.

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1 And courts have rejected that. And it's because they
2 have a value for the in-person and live trial.

3 And we're saying that there -- that is a part of the
4 law that you're considering in this case. And we don't see
5 any reason for supplanting that for going to the transcript
6 and providing hearsay as opposed to live testimony with
7 anything we've seen here in this case, Your Honor.

8 THE COURT: Okay. Thank you. Thank you for your
9 argument.

10 Mr. Kent.

11 MR. KENT: Yes. Thank you, Your Honor for LAN. We
12 second VNA's position. I would add just a couple of small
13 comments.

14 We heard from, I believe, it was Governor Snyder's
15 attorney that the courts carefully considered the fact that
16 the witness should not be allowed to control the narrative.

17 And that sounds to us like what essentially is
18 happening here, that the witness through the guise of claiming
19 the Fifth say, "I do not have to testify at all. Just play my
20 deposition."

21 That is their attempt to control the narrative.

22 THE COURT: Have you subpoenaed these witnesses?

23 MR. KENT: We have not because VNA has.

24 THE COURT: Oh, okay.

25 MR. KENT: There's no need to doubly subpoena the

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1 same witness.

2 THE COURT: I saw them on your witness list.

3 MR. KENT: That's why it is -- VNA's taking the lead
4 on that. I would say that there is just as there are
5 constitutional rights for the criminal defendants, there are
6 rights under the Seventh Amendment to jury trials. There are
7 other rights that the parties to this civil litigation has,
8 which the Court, of course, will balance and appropriately so.

9 One does not trump the other necessarily. There's a
10 way to balance the rights of each. And the issue that the
11 Court the going face in large part here is not whether there's
12 a waiver, not whether it happened in the same proceeding.

13 The issue is going to the scope of that waiver,
14 because as the Court said in quoting Judge Lawson, "When the
15 subject is disclosed, then it waives the privilege as to the
16 details."

17 And that's why it's not really fair to say, "Well,
18 you had a deposition, and you had questions there." A
19 discovery deposition, when you have multiple parties, limited
20 amount of time, is going to have a different wording.

21 It's going to have a different emphasis. It's not
22 going to be exactly the same, and we need to have that
23 opportunity to explore the subject on which there has been a
24 waiver and maybe the details. We can't just be the exact
25 words. It cannot be just limited to that, and it ends.

1 So we think it is appropriate for the witnesses to
2 come live, to testify live. If they do have a fear of
3 additional, somehow different incrimination beyond what has
4 already been waived, and that's hard to imagine given the
5 breadth of their depositions, there's a broad waiver, then
6 that's the time to deal with that.

7 The question today is do you quash the deposition,
8 quash the subpoenas entirely.

9 THE COURT: Mr. Kent.

10 MR. KENT: Yes.

11 THE COURT: As the person who's trying to manage the
12 process, how would we avoid -- I mean, I've got the time, but
13 the jury doesn't. They have jobs. They have families. They
14 have lives. We can't keep them here forever, and we don't
15 want to.

16 So practically how do you see that happening if what
17 you're telling me is that in a discovery deposition, you frame
18 your questions differently, you so and so, you know, etcetera.

19 And so if the waiver is as to the general subject
20 matter that was asked at the deposition -- and let's say that
21 I make that decision -- then how are we going to actually get
22 through this without going to the sidebar room in the back
23 after every question?

24 MR. KENT: Well, I think that is determined in large
25 part by your ruling on the breadth of the waiver. As opposed

1 to saying, "Well, you changed the word. So that's
2 inappropriate."

3 THE COURT: Okay. So I would make a -- so let's say
4 for sake of argument, I make the decision that it's a single
5 proceeding for all the reasons we've discussed that I won't
6 repeat.

7 That there was a broad waiver at the deposition. And
8 so -- and I learned what the subject matters are that were
9 asked at the deposition that are relevant here to be presented
10 here.

11 And I make a decision that any details on -- directly
12 related to those subject matters are grounds that -- or
13 questions that can be asked and must be answered.

14 We have a separate proceeding for new subject matter
15 that wasn't asked at the discovery deposition, and I make
16 those decisions ahead of time. Is that?

17 MR. KENT: I think that was close to what you had
18 presented as a hypothetical to begin with as a potential. The
19 difference being primarily that it sounded to me like the
20 thought was, "Well, let's just play the deposition and then
21 figure out what else it is" --

22 THE COURT: Okay. When I start talking, that's the
23 part you stop talking. We've been through this. I know I'm
24 interrupting you, but I'm trying to move it along.

25 Yeah. That's a proposal for just trying to be

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1 practical. There are a couple of cases that say that in
2 Northern District of Illinois, finally live testimony is
3 preferred over deposition testimony.

4 And another case also in the Sixth Circuit about a
5 district court talking about videotape depositions are not the
6 equivalent of live testimony by these witnesses.

7 So your colleague, Mr. Mason has -- is your
8 microphone on, Mr. Mason?

9 MR. MASON: I believe it is.

10 THE COURT: I think it is.

11 MR. MASON: May I just make one brief comment?

12 THE COURT: Sure.

13 MR. MASON: From a procedural standpoint, we'll work
14 with the Court with respect to those headings with citations
15 in the -- so that your Court, Your Honor will know the issues,
16 and we don't need sidebars all the time as a practical matter.

17 The second --

18 THE COURT: I wasn't thinking so much that you -- I
19 was thinking that the witnesses' lawyers would be objecting
20 nonstop.

21 MR. MASON: Well, they shouldn't be if they read the
22 transcript for sure.

23 And as officers of the Court, we would have a
24 responsibility to stay within the bounds of what's been asked,
25 so that that would not be an issue. And I don't anticipate it

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1 will be an issue.

2 The second thing is, is just the issue of procedural
3 -- Mr. Kent did say it appropriately. Justice -- you know,
4 our clients has rights, as well, and we're not permitted to
5 use or play depositions in the case under the rules if a
6 witness is available. And yet the flip side --

7 THE COURT: Well, unless it's just agreed upon --

8 MR. MASON: And we don't agree to it.

9 THE COURT: I've done it myself frequently, because
10 we don't want to pay the doctor \$20,000 to come in at trial,
11 so we fire up --

12 MR. MASON: I understand. But the rule -- unless
13 there's an agreement, the rule provides that we cannot. And
14 yet they want to subvert that and flip it upsidedown.

15 THE COURT: I hear you.

16 MR. MASON: That's not fair to our client. Thank
17 you.

18 THE COURT: I hear you.

19 One last question, Mr. Christian, is Mr. Quigg
20 brought up that apparently VNA didn't use all of the time at
21 the deposition.

22 What impact, if any, should that have?

23 MR. CHRISTIAN: Well, Your Honor, I didn't hear he
24 say VNA. I thought I heard "defendant."

25 THE COURT: Oh.

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1 MR. CHRISTIAN: Either way, whether we -- I'm not
2 aware, and we're not aware of any requirement that we ask
3 every question that we would like to ask during deposition.

4 THE COURT: I'm not aware of that rule. Okay.

5 MR. MAIMON: May I briefly, Your Honor?

6 THE COURT: Yes. Please.

7 MR. MAIMON: Thank you. The Court has heard argument
8 today on a whole range of issues. And I'd like just to
9 address a couple of them.

10 First of all, there is no authority within the
11 Eastern District of Michigan or the Sixth Circuit, as far as
12 I'm aware, that says the constitutional rights of any litigant
13 are curtailed or not upheld if a judge or a circuit or a court
14 decides to hold trials remotely.

15 During the pandemic, there were trials held
16 throughout the country, reviewed on appeal with regard to
17 whether or not cases can proceed. Some courts decided to do
18 it. Some courts decided not to do it. But I don't think that
19 there's a Sixth Circuit controlling authority that says that
20 Zoom trials are not appropriate.

21 The second thing is that the Court gives the members
22 of the jury a clear instruction both before and after the
23 commencement of the evidence on how to judge the credibility
24 of witnesses including judging the credibility of witnesses
25 who appear via prior recording, whether it's by Zoom or

1 whether it's -- whether it's a -- something that was a
2 videotape.

3 In addition, the Court has --

4 THE COURT: So your argument, as I understand it, is
5 that we should just play the depositions and then examine the
6 witnesses live for any additional areas.

7 MR. MAIMON: Well, let me get to that in one minute,
8 Your Honor --

9 THE COURT: Okay.

10 MR. MAIMON: -- but I think also the Court has
11 considered whether or not under Rule 42 witnesses can be
12 brought to another courthouse and have their testimony be
13 compelled remotely. Again, juries take that into account, and
14 it's proper, and it's done all the time.

15 So these are not impediments to doing this. The --
16 one of the things -- and I know that one of the counsel for
17 the subpoenaed witnesses was being facetious.

18 But one of the things that rule 804 does contemplate
19 is a witness refusing to testify despite a court order.
20 That's 804A2. That makes that witness unavailable --

21 THE COURT: Right.

22 MR. MAIMON: -- that's simply part of the rule.

23 What this Court heard was the balancing that is
24 required for 804A1. And that is the difference between the
25 privilege on one side, which would make the witness

1 unavailable and the issue of waiver on the other, which would
2 mitigate against that unavailability.

3 And the Court heard about it. And I'm not here to
4 argue that. What I am here to argue, Your Honor, is that
5 there's another balancing that requires the Court's attention.
6 And that's what nobody talked about and what the defendants
7 want to ignore.

8 And that is Rule 403 balancing. Because outside of
9 the waiver that certain witnesses might have done, and outside
10 of privileges that they might have, there are the rights of
11 the infant plaintiffs here. And they have the right not to
12 have their day in court and their Seventh Amendment rights
13 obstructed with a constant barrage of --

14 THE COURT: Well, that's why we would take precaution
15 that there not be a constant disruption in the trial and
16 distraction in the trial.

17 MR. MAIMON: I understand that. But, however, in
18 this trial from its beginning, the Court has introduced both
19 before voir dire and then in the beginning of the trial, the
20 parties and their counsel were now going to introduce with
21 each of these witnesses another attorney who's now going to
22 have the right -- in fact, if you listen to them carefully,
23 and I respect it -- the responsibility when they think
24 something has crossed the line to start invoking privilege in
25 front of a jury and invoking objections in front of the jury.

1 The Court suggested a procedure which we believe
2 properly balances the interest and all of the rights of all of
3 the parties and protects the innocent plaintiffs from
4 prejudice. That is to show the videotapes, which is the
5 testimony that was given, which is the questioning chosen by
6 defense counsel to make the points that they wanted to make.

7 To the extent that there are additional areas of
8 testimony, the Court can hold a hearing outside of the
9 presence of the jury so that we know exactly what it is.

10 The Court suggested maybe, you know, it sounds
11 ridiculous --

12 THE COURT: Mr. Maimon, what would be wrong
13 procedurally for the rights of your clients or anyone's rights
14 in the case, with having the witness testify one time live
15 with all of these disputes getting taken care of outside the
16 presence of the jury?

17 So we know that if an area was covered in the
18 deposition, it can be covered in some additional detail in the
19 trial testimony? I won't tolerate an objection to that,
20 because it will already be on the record in the out-of-court
21 hearing.

22 Mr. Mason likes to put things on the record twice.
23 It's not going to happen anymore.

24 MR. MAIMON: I understand.

25 THE COURT: And I'm not calling you out for any other

1 reason to say I'm not allowing it already, and I won't allow
2 it then.

3 MR. MAIMON: Right. And I take defense counsel -- I
4 pay serious attention to what defense counsel say, including
5 the first time that we were here with the Court on this issue
6 where they were insistent that what they -- what they want is
7 they want the jury to see these people take the Fifth
8 Amendment.

9 They want the jury to draw adverse inference.

10 THE COURT: No. I don't care if they said that or
11 not. They have a -- there's motions in limine that have been
12 decided regarding that. And I believe -- although I don't
13 have it sitting in front of me -- that my ultimate decision
14 was the fact of a criminal indictment could show bias. It
15 can't be referenced in the opening, because no one's testified
16 in the opening.

17 But it certainly -- lawyers are permitted to find out
18 if the witness's have pending criminal charges on the subject
19 matter.

20 MR. MAIMON: I understand. And that was not -- I'm
21 sorry. I was unclear. That's not what I was referring to.

22 When we were here talking about these witnesses being
23 subpoenaed and whether or not they would have to come, defense
24 counsel for both VNA and LAN stated explicitly on the record
25 that they want the invocation of the Fifth Amendment privilege

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1 in front of the jury.

2 They want the jury to draw an adverse inference based
3 on that invocation of the Fifth Amendment.

4 THE COURT: Okay.

5 MR. MAIMON: And we take them at their word that that
6 is something that they want --

7 THE COURT: No.

8 MR. MAIMON: -- and if Your Honor is asking me what
9 am I concerned about, I'm concerned about exactly what they
10 told us one of their prime motives was.

11 THE COURT: I don't know about the prime motive.
12 But Mr. --

13 MR. MAIMON: One of.

14 THE COURT: Okay.

15 MR. MAIMON: But if we go with the plan -- again, I
16 don't know that a word here or a word there makes a
17 difference, but if the Court is concerned and if the case law
18 talks about further incrimination, further than what's had at
19 a deposition, it is -- it's not even a matter of failing
20 memory or different memory.

21 People describe things differently. When you ask me
22 a question now and perhaps when you ask me a question ten
23 minutes from now, I may use a different analogy. I may
24 emphasize a different detail. That's the nature of human
25 discussion and human discourse.

1 What we're concerned about -- and again, we're happy
2 to live with the Court's ruling. What we're concerned about
3 is exactly what the defendants told us they wanted this jury
4 to have.

5 And to protect the first -- the Fifth Amendment
6 rights of people who are under indictment, I don't believe
7 that the Court would bar their criminal defense attorneys from
8 being present and being able to raise issues.

9 And if they felt that their fiduciary duties to their
10 clients required them to do so, that is exactly the -- what we
11 termed "the circus." But it's the prejudice to the infant
12 plaintiffs that's not necessary here.

13 And that quite frankly, significantly and
14 substantially outweighs the probative value of the different
15 wording of the question as opposed to the deposition where
16 they had a full and fair opportunity to ask these witnesses
17 questions. That's our position.

18 THE COURT: Okay. Mr. Christian.

19 MR. CHRISTIAN: Sure, Your Honor. So as terms to
20 adverse inferences, I will say that here now that should we
21 wind up with a factual situation that we wind up with a fact
22 that's probative to our position where someone takes the
23 Fifth, there could be, and we want to preserve that
24 possibility.

25 I think that to state that it's some kind of

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1 overwhelming motive, one, I think it's irrelevant. But, two,
2 I think it's inaccurate.

3 And just as an aside, I'm not aware of any infant
4 plaintiffs in this case, given that if the kids were around in
5 2015, they wouldn't be infants anymore.

6 MR. STERN: "Infancy" means under 18 in the law.

7 THE COURT: In Michigan -- I know you're not from
8 Michigan. But "infancy" is a legal term of art from anyone
9 from birth to --

10 MR. CHRISTIAN: Basically a minor.

11 But the point is I don't think motives are relevant
12 here, Your Honor.

13 THE COURT: Okay. And that -- I hear you.

14 MR. KENT: Your Honor? May I add --

15 THE COURT: Very briefly. Because I have an
16 in-custody defendant, and I don't want to keep him there.

17 MR. KENT: The one comment is that question of
18 whether or not it's played before the jury or informed to the
19 jury is totally separate and can be dealt with at that time as
20 opposed to the procedure for allowing the witnesses here to
21 quash these subpoenas and assert their Fifth Amendment rights.

22 That's a totally separate issue.

23 THE COURT: Okay. Thank you.

24 MR. KENT: It should be dealt with separately.

25 THE COURT: Okay. Mr. Rusek, you had said you had

1 some rebuttal?

2 MR. RUSEK: Alexander Rusek on behalf of Croft. That
3 may be a holdover from our Zoom days. But I'll be brief, Your
4 Honor.

5 There's just a couple of points that I wanted to hit
6 on that have come up. We talked briefly in regards to the
7 single proceeding rule about State v. Roberts, and that was a
8 prior deposition case that did not waive for the purposes of
9 trial.

10 And there's a quote there that I think is important
11 for -- to highlight today. Is that -- this is State v.
12 Roberts. "The majority rule preserves a witness's right to
13 assert the privilege in subsequent to distinct stages of a
14 single proceeding."

15 And I think that that sentence alone leaves us where
16 there can be distinct stages of an overall civil case. And
17 that those distinct stages are separate proceedings under this
18 framework of the one proceeding rule.

19 And I think that's supported also by another case
20 that we didn't discuss earlier but was cited in our brief.
21 That's State v. Whiting, and that was from the Wisconsin Court
22 of Appeals, 402 N.W.2d.723.

23 And that was where the Wisconsin Court of Appeals
24 held that just because a nonparty witness testified at the
25 preliminary examination at a criminal case, that that nonparty

1 witness could then assert the Fifth Amendment at that trial in
2 the same case.

3 Certainly, a preliminary examination is not the same
4 as a deposition, but there's certainly a lot of similarities.
5 You have all parties present. You have the opportunity for a
6 full examination. Some judges may cut you short in a
7 preliminary examination.

8 But in our depositions, they went on for days and
9 days and days. Mr. Croft was deposed for three days.
10 Everyone in this room on behalf of their respective clients
11 had a full opportunity to depose him, Your Honor, and they did
12 so. And he answered those questions.

13 Circumstances changed, and now upon advice of
14 counsel, he is asserting his Fifth Amendment rights at trial
15 in this matter.

16 THE COURT: Okay. Thank you.

17 MR. RUSEK: Your Honor --

18 THE COURT: Oh, you have more.

19 MR. RUSEK: Yep. That was just on the single
20 proceeding rule.

21 Just to comment briefly. I think that the plaintiffs
22 have really laid out here some of our -- my major concerns.
23 And that's what the defendants seemingly want to do based on
24 their prior assertions.

25 And their preference, it seems, would be to create a

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1 parade of horrors in front of the jury of having these men
2 come out and assert the Fifth over and over again. The Court
3 can --

4 THE COURT: That's not going to happen. I'm not
5 worried about that.

6 MR. RUSEK: And I agree, Your Honor. Absolutely
7 should not. Because that's a horrible outcome, and it's not
8 fair for anyone.

9 What I think the Court proposed earlier, and we --
10 I'm not going to backtrack in my positions in the brief as far
11 as waiving those arguments.

12 THE COURT: Right.

13 MR. RUSEK: But I think that the Court has a way to
14 address this that's fair. And I think that basically what you
15 talked about earlier of having the five gentlemen declared
16 unavailable witnesses, because they intend to assert their
17 Fifth Amendment privileges.

18 Then under Rule 804, their prior testimony, both at
19 their depositions and for those who testified before Congress,
20 can be played or read to the jury.

21 And then we can establish a procedure that occurs
22 outside of the jury that doesn't require the five nonparty
23 witnesses to testify wherein the VNA defendants, the LAN
24 defendants could submit perhaps proposed questions that they
25 believe would not infringe on those Fifth Amendment rights and

1 were not previously asked of those depositions.

2 You would then allow the nonparty witnesses the
3 opportunity to object to those questions. And then if there's
4 an appeals that need to be made, then we could make those.

5 THE COURT: Okay.

6 MR. RUSEK: I think that there's a practical,
7 reasonable solution, Your Honor, that doesn't involve pulling
8 a witness up there, having myself or co-defense counsel sit
9 next to the witness, to have us have to go through hundreds of
10 pages of deposition transcripts almost on the fly and then
11 advise -- which we can't --

12 THE COURT: Mr. Marcus, where do you think that the
13 criminal defense lawyers would be sitting if I had live
14 testimony for everything?

15 MR. CHRISTIAN: Your Honor, I think, first of all,
16 the criminal defense attorneys will spend a lot of times
17 sitting next to their clients preparing for it.

18 THE COURT: Right. I'm talking about the courtroom.

19 MR. CHRISTIAN: Your Honor, I haven't worked out
20 those details. But it is workable. This isn't the first time
21 that --

22 THE COURT: It matters to me in terms of the
23 prejudice argument that Mr. Maimon made. If we have folks
24 with their criminal defense lawyers in that Plexiglass
25 enclosed witness box whispering and consulting on every

1 question, that seems like it would be quite prejudicial.

2 MR. MASON: They can have my seat, Your Honor. I'll
3 give up my seat, and they can sit here.

4 THE COURT: Okay, Mr. Mason.

5 MR. CHRISTIAN: And Your Honor, I would underscore,
6 Your Honor, that still that doesn't change the waiver issue
7 because --

8 THE COURT: No, I don't -- I don't think it changes
9 the waiver issue. But I've got a number of competing issues
10 that I'm trying to think through.

11 MR. CHRISTIAN: Certainly.

12 MR. RUSEK: And, Your Honor, normally I think that we
13 could find a workable solution in regards to the stand. But I
14 know that I would feel extremely uncomfortable having any
15 discussions with my client anywhere near a hot microphone.

16 And not only because it's -- you know, it wouldn't be
17 a part of the transcript, of course, but that stream is going
18 out to the public, and potentially anyone else sitting in here
19 is a huge concern.

20 THE COURT: Okay. All right.

21 MR. RUSEK: And as far as the procedure of consulting
22 at that point and what the Court touched on earlier as far as
23 sidebars, there's quite likely that we'd have to leave the
24 courtroom multiple times, consult on these issues.

25 One story that I heard about in a grand jury

1 proceeding that happened a while during COVID was that the
2 defense attorney wasn't permitted to sit next to their client
3 during that grand jury proceeding.

4 And essentially had to, like, waive them down to say,
5 "No, don't answer that question." And that's just not
6 practical, and it's prejudicial to everyone.

7 THE COURT: Okay. You know, I have a problem, which
8 is another matter, two more that I need to handle.

9 Was there anything that has not been said that anyone
10 wants to say?

11 MR. SWOR: Two minutes.

12 THE COURT: Okay. One minute.

13 MR. SWOR: Okay. Mr. Marcus said that this is the
14 same proceeding. It's the same claims, he said. That's not
15 true.

16 THE COURT: His last name is Christian. But that's
17 his first name, so it's close.

18 MR. SWOR: I apologize.

19 THE COURT: That's okay.

20 MR. SWOR: In the notice of nonparties at fault filed
21 11-13-2018, in Case number 16-10444, Veolia made a substantial
22 claim of fault regarding Mr. Ambrose, which did not include
23 any claim that Mr. Ambrose instructed Veolia not to
24 investigate going back to Detroit.

25 Then in a separate -- that was a year -- almost two

1 years before Mr. Ambrose gave his deposition. Six months
2 after Mr. Ambrose gave his deposition. And almost a year
3 after Mr. Nicholas testified at his deposition on 12-23-20, in
4 -- let me see -- the notice for nonparty is ECF number 672 in
5 the 2016 case.

6 THE COURT: Yes, I know.

7 MR. SWOR: Then in the 2017 case, ECF number 324
8 between pages 184 and 187. Veolia changes its claim and
9 claims that Mr. Ambrose -- now after Mr. Ambrose's deposition,
10 after Mr. Nicholas's deposition, they changed their claim to
11 say that Mr. Ambrose instructed Veolia not to review or not to
12 consider going back to Detroit.

13 THE COURT: Sure. Isn't that exactly what a lawyer
14 should do? If they get additional information at a
15 deposition, they should bring it to the party's attention in
16 the appropriate manner. I don't --

17 MR. SWOR: Well, you asked me what it changed
18 after --

19 THE COURT: The change I was looking at was in the
20 risk, the risk for self-incrimination. But the terrific thing
21 that you've pointed out, but I have to -- I actually have to
22 call a close to this hearing.

23 And the ferric chloride issue for anybody who wants
24 more on ferric chloride, I don't think we can get -- I know we
25 can't get to today. So what I would ask is that our jury will

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1 be here at 9:00 A.M., and if we could start at 8:30 in the
2 morning, then we can address ferric chloride in the morning.

3 I don't think anybody's going to play the Lawrence
4 deposition or any depositions that have ferric chloride in it
5 tomorrow.

6 So -- and Mr. Kent is affirming, and I think
7 Mr. Stern did, too. So --

8 MR. KENT: It's our understanding.

9 MR. STERN: We were, Your Honor.

10 THE COURT: Oh, you are going to play that
11 deposition?

12 MR. MAIMON: But we'll have time. If the Court rules
13 on it between 8:30 and 9:00, we have time to make any
14 adjustments that the Court rules on if any are required.

15 THE COURT: Okay. Good. So thank you, all, for the
16 argument. And I appreciate meeting the people who I've not
17 met before but also seeing familiar faces like Mr. Rusek and
18 others.

19 MR. STERN: Just for the record, it's not the
20 Lawrence deposition that we plan to play tomorrow. It's the
21 Chen deposition that we plan to play tomorrow.

22 THE COURT: Oh, okay.

23 MR. STERN: But it does touch on the issue of ferric
24 chloride.

25 THE COURT: I'll make sure to focus special attention

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1 on Chen. But thank you.

2 Let me just say this on the record. What I'll do is
3 take the issue under advisement and issue a written decision.
4 I'm sorry. I forgot to say the main point. All right.

5 (Proceedings Concluded)

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7
8 CERTIFICATE OF OFFICIAL COURT REPORTER

9 I, Jeseca C. Eddington, Federal Official Court
10 Reporter, do hereby certify the foregoing 108 pages are a true
11 and correct transcript of the above entitled proceedings.

12 /s/ JESECA C. EDDINGTON
13 Jeseca C. Eddington, RDR, RMR, CRR, FCRR

03/15/2022
Date